Desk Copy with Corrections.

Supreme Court of Georgia

OCTOBER TERM, 1914

No. 3 CRIMINAL DOCKET

LEO M. FRANK
Plaintiff in Error

v.

THE STATE OF GEORGIA
Defendant in Error

WRIT OF ERROR
TO
FULTON SUPERIOR COURT

Brief and Argument for Plaintiff in Error

HENRY A. ALEXANDER,
Of Counsel.

TYE, PEEPLES & JORDAN,
HERBERT J. HAAS,
LEONARD HAAS,
HENRY A. ALEXANDER,
Attorneys for Plaintiff in Error.

Johnson-Dallis Co., Printers, Atlanta, Ga.

CONTENTS.

Statement of the case 1-3

First ground of general demurrer 3-32

Second ground of general demurrer 33-36

Third, fourth and sixth grounds of general demurrer 36-63

Fifth ground of general demurrer 63-82

Seventh and eighth grounds of general demurrer 82-84

Decisions of Federal and State Courts reviewed . 84-129

Common Law Authorities and Text Writers 130-133

Notes and Annotations 133-135

Sixth and seventh grounds of motion 136-137

LEO M. FRANK,
Plaintiff in Error,

v.

STATE OF GEORGIA,
Defendant in Error.

No. 3
Criminal Docket, Supreme Court of Georgia, October Term, 1914. Writ of Error to Fulton Superior Court.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

Leo M. Frank was convicted of murder and sentenced to death at the July Term, 1913, of Fulton Superior Court. A motion for a new trial was filed at the same term, and was overruled and denied by an order dated October 31, 1913. A writ of error was taken to this Court, which, on February 17, 1914, entered a judgment affirming the judgment of the superior court. On March 14, 1914, the defendant was re-sentenced to be executed on April 17th following. On the 16th of April, 1914, after the required notice had been given, an extraordinary motion for a new trial was filed, and made returnable to the 22nd of April, 1914. After several postponements, the hearing on said extraordinary motion was concluded on May 6, 1914, on which day the court rendered a judgment denying said motion for a new trial and overruling the same. A writ of error was signed by the judge of said Court on the 26th day of May, 1914, bringing said judgment for review before this court, where it was affirmed on October 14, 1914.

On April 16, 1914, simultaneously with the extraordinary motion for a new trial, a motion to set aside the verdict was filed in the Superior Court, and, after

various postponements, came on to be heard on June 5, 1914.

The grounds of this motion were in brief as follows:

1. Because the court did not have the defendant brought in the court room to be present at the reception of the verdict but kept him incarcerated at the time in the county jail, and if the cause of such failure to have him in court was the result of any agreement between his counsel and the judge looking to a waiver of his presence and his counsel's presence, that his counsel had no authority to make such waiver; that he did not in fact authorize them to make such waiver; that he had no power either to waive his presence himself or to authorize his counsel to do so; that any waiver or agreements made were the result of the coercion exercised on the minds of the court and his counsel by the excitement and terror surrounding the trial; that the failure of the court to have him present at the reception of the verdict denied him due process of law under both the state and federal constitutions; and that the act of this counsel in absenting themselves from the court at the reception of the verdict deprived him of the right of the benefit of counsel given by the constitution of the state.

2. The second ground of the motion was that in overruling the motion for a new trial, the mind of the court, as evidenced by his statement in rendering the judgment, was in a state so undecided and wavering as to deprive his utterance of the character of a judgment, and thus denied the movant due process of law as guaranteed by both the state and federal constitutions.

3. The third ground of the motion was that the extreme and uncontrolled disorder that surrounded the trial robbed it of its character as such, and denied the defendant due process of law under both the state and federal constitutions.

On June 6, 1914, after the allowance of a brief amendment to the motion, the court sustained a general de-

murrer and special demurrers filed by the state, and dismissed said motion. A writ of error was taken to said judgment returnable to the October Term, 1914, of this Court.

BRIEF AND ARGUMENT.

Every contention made in the pleadings or the bill of exceptions is presented to and urged upon this court.

The first ground of the general demurrer filed by the state was in the following terms, to-wit:

> "Said motion should be dismissed because a motion to set aside a verdict or judgment of the Court should be under the law predicated upon some defect appearing on the face of the pleadings or record, and the motion filed is not one predicated upon any defect appearing on the face of the pleadings or the record."

This objection is based upon a misconception of the practice of this state. The point made is that inasmuch as the attack on the verdict is based upon matters outside the record, a motion to set aside the verdict could not be made, it being contended that the latter is restricted to those cases where the defect is apparent on the face of the record. While it is true that the matters urged as the ground of the motion to set aside the verdict did not appear on the face of the record, and it is also true that with certain exceptions indicated in the case of Ford v. Clark, 129 Ga. 292, that the practice of this state limits a motion to set aside a judgment to cases where the defect is apparent on the face of the record, the contention of the state is fallacious in two respects:

1. It ignores the distinction clearly drawn in decisions

in this state between motions to set aside **judgments** and motions to set aside **verdicts.** Conceding it to be the law that a motion to set aside a **judgment** must be predicated on matters apparent on the face of the record, it by no means follows that this is true of motions to set aside **verdicts.**

Nolan v. State, 53 Ga. 136.
Smith v. State, 60 Ga. 430.
Jordan v. Tarver, 92 Ga. 379.
Clark's Cove Guano Co. v. Steed, 92 Ga. 440.
Ayer v. James, 120 Ga. 578.

In Nolan v. State, 53 Ga. 137, the court said in the 2nd headnote:

> "It was the legal right of the defendant to be present when the verdict was rendered, and had a **motion to set aside such verdict** been made on the ground of his absence, it should have been granted."

In the body of the opinion, Chief Justice Warner said:

> "That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made **to set aside the verdict** on the ground of his absence, that motion should have been granted by the court. The defendant, however, did not make a motion to set aside the verdict, but made a motion in arrest of judgment. The 4629th section of the Code declares that no motion in arrest of judgment shall be sustained for any matter not affecting the real merits of the offense charged in the indictment. A motion in arrest of judgment is predicated on some defect which appears on the face of the record or pleadings.
>
> "It has never been the practice of the courts of this state, so far as we know or are advised, to require that the fact of the defendant's presence at

the time of the rendition of the verdict, should be entered on the record, and made a part thereof. If the defendant is not present when the verdict is rendered, that is a fact extrinsic of the record, and may be shown on a motion **to set aside the verdict** for that reason."

In Smith v. State, 60 Ga. 430, the court said on page 434:

"The authority most in point on the question before us is 53 Ga. 137. It rules that absence at the rendition of the verdict is a fact extrinsic of the record, and may be proved on **motion to set aside the verdict**; and that the judgment will not be arrested because presence does not affirmatively appear, in express terms, on the face of the record. **The ground of the decision is established practice believed to be uniform.**"

In Jordan v. Tarver, 92 Ga. 379, a headnote decision, the court, while declaring the procedure in that particular case to have been defective, recognized the correct rule of procedure. In the 3d headnote, it was said:

"The superior court cannot, of its own motion and without notice to the parties concerned, set aside a verdict rendered by a jury at a previous term and the proceedings on which the same was founded. Notice to an attorney of record in a motion to establish a copy of the judgment alleged to have been entered upon a verdict is not notice to the client **for the purpose of setting aside the verdict**; another attorney, and not this one, being the attorney of record in the proceeding to obtain the vedict."

In Clark's Cove Guano Co. v. Steed, 92 Ga. 440, a headnote decision, the distinction between a motion to set

aside a verdict and a motion to set aside a judgment is distinctly recognized. The court said:

> "Where a judgment of the superior court is based upon the verdict of a jury, and there is no motion for a new trial **or to set aside the verdict,** a motion to set aside the **judgment** will not be granted for any cause which does not appear upon the face of the record of pleadings. The motion in the present case being based wholly on aliunde grounds, the general demurrer thereto should have been sustained."

In Ayer v. James, 120 Ga. 578, the Court speaking unanimously through Justice Evans, said:

> "Treated technically as a motion 'to set aside the **judgment,**' the motion presented in behalf of James was clearly insufficient; for, as was held by this court in Clark's Cove Guano Co. v. Steed, 92 Ga. 440, 'Where a judgment of the superior court is based upon the verdict of a jury, and there is no motion for a new trial or **to set aside the verdict,** a motion to set aside the **judgment** will not be granted for any cause which does not appear upon the face of the record or pleadings." To the same effect, see Regopoulas v. State, 116 Ga. 596; Tietjen v. Merchants' Bank, 117 Ga. 502. In the first case cited, it appeared that the plaintiff 'sued Steed and his wife on a promissory note. . . . Mrs. Steed moved to set aside the judgment, upon the grounds that her husband had the management of the defense and was a material witness, but was sick and unable to attend court on the day of the trial; that she had a good defence, having signed the note as security for her husband,' etc. To this motion the plaintiff demurred on the ground, among others, that the judgment could be set aside only for error appearing on the face of the record. **No motion to vacate the verdict** appears to have been made.

> "In the present case, the demurrer did not explicitly point out the objection that no facts appearing of record were relied on as the basis of the defendant's motion, and the trial judge evidently dealt with it as though it were the equivalent of a motion to **vacate the verdict** notwithstanding it recited that the defendant 'moves to **set aside the judgment**' rendered in the case."

In disposing of the case, this court, in order to avoid, as it stated, a "miscarriage of justice," gave directions that James, the losing party, have leave to amend his motion in two respects:

1. By alleging certain additional facts, and
2. By changing the name of his motion from a "**motion to set aside the judgment**" to a "motion to **vacate the verdict.**"

The doctrine stated in this unanimous decision has never been overruled, question or doubted in any subsequent decision and stands as the final authoritative utterance of this court controlling the point of practice in issue.

The second respect in which the state's contention set forth in the first grounds of its demurrer is fallacious is, that it assumes that the practice of this state provides no method by which a verdict or judgment can be attacked for matters not appearing on the face of the record.

This assumption is wholly erroneous and ignores the existence of the well established rule that where a verdict or a judgment is defective on account of matters not appearing on the record it may be attacked "by petition with rule nisi or process and service upon the necessary parties." The objection made misconceives the law and is wholly without merit. It is submitted that under the statutes of this state embodied in §§5957,

5958 and 4358 of the Code of 1910, and the interpretations of these sections embodied in the decisions of this court, the practice in this state on the subject of motions to arrest or set aside a verdict or judgment is as follows:

First. If the defect in the proceedings be apparent on the face of the record the proper course of procedure is either by motion to arrest the judgment or by motion to set aside. The motion to arrest the judgment must be filed at the term at which the judgment is rendered, but the motion to set aside the judgment may be filed at any time within three years of its rendition. However, both the motion in arrest and the motion to set aside the judgment must be predicated upon errors appearing on the face of the record. Neither of them are available if the defect be based upon matters outside the record.

Second. If the defect in the proceedings is not apparent on the record, and depends upon extrinsic matters, the proper procedure is by petition or motion for a rule nisi or process to be served upon all parties interested in sustaining the judgment. It is not required that this petition be filed at the first term, but may be filed at any subsequent term provided it be within a reasonable time.

The origin and history of this procedure is, in brief, as follows: It was evolved through the efforts of this court, on the one hand, to follow certain older decisions undertaking to interpret the law contained in the successive Codes of the state, now embodied in §§5957, 5958 and 4358, and, on the other hand, to provide a remedy for a case of common occurrence seemingly overlooked and not provided for by these older decisions, that is, where the defect was not apparent on the record.

At common law, and apart from a writ of error to an appellate court, or a bill in equity, a judgment could be attacked in two different ways according to the nature of the objection. If the defect appeared on the face of the record, the procedure was by motion in arrest of judg-

ment, which it was necessary to file at the same term at which the judgment was rendered. If the defect was based upon matters outside the record, the procedure was by motion to set aside the judgment. It was not required that this motion be filed at the same term, **but could be presented within a reasonable time.** This was the established practice at common law. In the opinion of Judge McCay, rendered in the case of Fannin v. Durdin, 54 Ga. 476, at 479, a clear and comprehensive statement of this procedure at common law was made, as follows:

> "Independently of proceedings in the nature of an appeal, there was, at common law, two modes of attacking a judgment not void. One was by motion in arrest of judgment, the other by motion to set aside for irregularity. These two modes are both recognized by our Code: See Sections of the Code, 3587, 3589. Tidd's Practice, 512, says an irregularity consists in omitting to do something that is necessary for the due and orderly conducting of a suit, or the doing in an unseasonable time or improper manner. In an irregularity the proper motion is to 'set aside the proceedings:' Tidd's Practice, 513. A motion in arrest must be made before the judgment is entered, and is for defects in the pleadings: Tidd's Practice, 918, 919, 928. The codifiers are presumed to have used the words 'motion in arrest' and 'motion to set aside' in the sense of the common law. In that sense they are by no means synonymous phrases, names for the same thing. As contended in the argument, these two phrases, "motion in arrest" and "motion to set aside," refer to the same thing, and are only distinguished by the fact that one is made during the term and the other within the statute of limitations. But this is an entire mistake. At common law these two motions were used for different purposes and under different

circumstances. Whilst they each had the qualification as to the time of their use, as provided by the Code, except that a reasonable time was in the place of the statute of limitations, yet they were each confined to their own specific purpose, and when the case invoked that purpose the right of the party to use them was barred accordingly, as the term, or a reasonable time, had passed. The proceedings of a court are comprehended under these two heads, the pleadings and the practice. The former are the altercations of the parties, as the declaration, the pleas, the replications, etc., etc.; the latter includes all those rules adopted by the court for securing regularity and method in its proceedings. Objections to the sufficiency of pleadings were made by demurrer and by motion in arrest of judgment. Objections for violations of any of the rules of practice were by motion to set aside for irregularity. The former, to-wit: demurrers and motions in arrest, were regulated by the rules of special pleadings, and were controlled by the precise logic of that methodical and unbending system. A demurrer, if not put in at the proper stage, to-wit: before a plea to the merits, was inadmissible, and a motion in arrest, if not made during the term at which a verdict was rendered, came too late, because within four days the judgment was entered up, and could not, therefore, be arrested: Tidd, 928. Motions to set aside for irregularity—that is, for a violation of the rules of practice—stood on a different footing. They rested in the discretion of the court. They could not be made after the other party had acted—that is, accepted them—and their limit was a reasonable time: Tidd, 512, 515. The result of these rules was, when applied to judgments, that objections to the sufficiency of pleadings must always be made before final judgment, whilst objections for irregularity

might be made within a reasonable time. And this distinction was not only based on sound logic, but upon the plainest principles of justice and public policy. The pleadings in a case are the statement to the court of the plaintiff's case and of the defendant's reply; each party, necessarily, has full notice of them, if the rules of practice as to filing, notice, etc., are complied with; they are read in open court, issue is taken upon them, and if they be insufficient, it is trifling with the court for the party complaining to lie still and say nothing until after judgment. Many, very many, defects that were good on demurrer are lost by taking issue and going to a jury, and all defects of pleading are cured by a judgment, if there be no arrest. In other words, objections for insufficiency of pleading in a regular suit, where there is an issue and a verdict, can only be made by motion in arrest of judgment, that is, during the term when the verdict is had, since within four days the judgment is entered up and cannot be arrested. Motions to set aside for irregularity, as I have said, stand on a different footing. They are not pleadings, and do not turn on those logical and technical rules which regulate pleadings—they are questions of notice, points of practice not read in open court—no issue is taken on them; the court neither by implication or in fact passes on them, and their propriety in each case may wisely be left to the discretion of the court, having in view the principles of justice and the diligence of the parties. I have run over the doctrine on this subject in England, so as to present the subject at a glance, without reference to the authorities. But a reference to them will show that these distinctions are fully recognized."

In this state, prior to the taking effect of the first Code in 1863, it clearly appears from the case of Mobley

v. Mobley, 9 Ga. 247, decided in 1851, that the common law procedure was in full force and that a court which had rendered a judgment would entertain a motion to set it aside for irregularities or defects not apparent on the face of the record. In that case, an attack was made upon the judgment of an ordinary granting a discharge upon the ground of fraud, and several terms after its entry. In the fifth headnote, the court said: "The judgment of a court of competent jurisdiction may be set aside by the court which rendered it for fraud or irreguarity." In the case of Winter v. State, reported in 18 Ga. 275, and decided in 1855, the facts were that at the June Term, 1854, the case having been called and there having been no appearance, a rule nisi was taken to forfeit the recognizance. At the December Term, 1854, a motion was made and sustained to set aside this rule nisi on the ground of matters not appearing on the record. The ground of the objection was a justifiable misunderstanding by Winter's attorney of an announcement made by the Judge as to the assignment of the case.

In the Code of 1863, the law regulating the practice in reference to arresting or setting aside judgments was stated as follows:

> "§3506. When a judgment has been rendered, either party may move in arrest thereof, or to set it aside for any defect not amendable which appears on the face of the record or pleadings."
>
> "§3507. A motion in arrest of judgment differs from a motion for a new trial in this: the former must be predicated on some defect which appears on the face of the record or pleadings, while the latter must be predicated on some extrinsic matter not so appearing. It also differs from a motion to set aside a judgment in this: the motion, in arrest of judgment, must be made during the term at which such judgment was obtained, while a motion to set it

aside may be made at any time within the statute of limitations.''

By the Act of 1876, page 100, the period of limitation for the filing of motions to set aside a judgment was fixed at three years. This Act is embodied in the present Code as section 4358, reading as follows: ''All proceedings of every kind in any court of this State, to set aside judgments or decrees of the courts, must be made within three years from the rendering of said judgments or decrees.''

The two sections quoted above as 3506 and 3507 of the Code of 1863 appear in exactly the same terms in the present Code as sections 5957 and 5958.

Construing these sections, the Supreme court so interpreted them as to overturn completely the procedure at common law, and the substantial distinction recognized at common law between motions in arrest and motions to set aside judgments. The court held that motions in arrest and motion to set aside judgments should be both predicated and could only be predicated upon defects appearing on the face of the record; but that while this was true, the two motions differed in the time within which they should be filed; a motion in arrest to be filed at the same term at which the judgment rendered, but a motion to set aside judgment could be filed at any time within the period of limitation, which was afterwards fixed by the Act of 1876 as three years.

The anomalous, and, indeed, as it appears, the purely arbitrary result of these decisions was to establish two methods of procedure for reaching the same defect, each identical in substance and in purpose, but to which entirely different periods of limitation applied according to the mere name by which they were designated. In other words, the practical result was this, that if the pleader called his motion a ''motion in arrest,'' he was required to file it at the first term, but if he would call it a ''motion to set aside'' the judgment, although alleging iden-

tically the same matters, he would be allowed three years for doing so. Such a result was wholly arbitrary and out of keeping with the spirit and trend of modern law. Moreover, these decisions led to this serious consequence, that the Georgia practice was left without any method of attacking a judgment for defects outside the record. In other words, while a superfluity of remedies was provided for defects apparent, there was none whatever left for defects not apparent on the record. In the case of Fannin v. Durdin, 54 Ga. 476, decided in 1875, after the adoption of the Code, Judge McCay, in the opinion which has been quoted above, endeavored to interpret these sections so as to conform them to the procedure at common law, but his efforts failed, and in subsequent cases this court departed from his interpretation and held that both motions in arrest of and motions to set aside judgments must be predicated on defects appearing on the face of the record, and that the only difference between them was that the former must be filed at the first term, and the latter within three years.

See:

Dugan v. McGlann, 60 Ga. 353.
Pulliam v. Dillard, 71 Ga. 598.
Artope v. Parker, 74 Ga. 462.
Clark's Cove Guano Co. v. Steed, 92 Ga. 440.
Myers v. Americus Mfg. Co., 109 Ga. 359.
Regopoulas v. State, 115 Ga. 232.
Regopoulas v. State, 116 Ga. 596.
Ayer v. James, 120 Ga. 578.
Ford v. Clark, 129 Ga. 292.

In the last case, there is a full discussion and review of this particular practice.

The most serious consequence from the establishment of this anomalous practice was that it left no method of procedure for attacking a judgment where the defect complained of was not apparent on the face of the record

except by direct writ of error or by a bill in equity. In order, therefore, to provide a remedy for this numerous class of cases, otherwise than the cumbersome and expensive methods of appeal or bill in equity, the Georgia courts found it necessary to re-establish, in a roundabout way, the old practice at the common law, and a rule was recognized and adopted in numerous decisions that defects not appearing on the face of the record could be reached by a petition with a rule nisi or process and served upon the adverse parties.

Mobley v. Mobley, 9 Ga. 247.
Winter v. State, 18 Ga. 275.
Dobbins v. Dupree, 36 Ga. 108.
Nolan v. State, 53 Ga. 137.
Fannin v. Durdin, 54 Ga. 476.
Dugan v. McGlann, 60 Ga. 353.
Tant v. Wigfall, 65 Ga. 412.
Turner v. Jordan, 67 Ga. 604.
Stewart v. Golden, 98 Ga. 479.
Regopoulas v. State, 116 Ga. 596.
Ayer v. James, 120 Ga. 578.
Union Compress Co. v. Leffler, 122 Ga. 640.
Davis v. Albritton, 127 Ga. 517.
Ford v. Clark, 129 Ga. 292.
Lyons v. State, 7 Ga. App. 50.
Benford v. Shiver, 13 Ga. App. 135.

In Mobley v. Mobley, 9 Ga. 247, the court said on page 250:

"(5.) **Again: the judgment of a Court of competent jurisdiction, may be set aside by the Court which rendered it, for irregularity.** 1 M. Con. Reps. So. Ca. 133. 1 McMullan's R. 292. 1 Hill S. C. R. 262. 3 McCord, 19."

In this case the ground of attack was **not apparent on the record**—a fraud committed by an administrator in

procuring a judgment of discharge. The motion to set aside the judgment was filed at a **subsequent** term. The judgment of discharge was granted in **1846** and the motion to set aside was filed in **1851.**

In the case of Winter v. State, 18 Ga. 275, the court said in the headnote:

> "(1). Where a party or his counsel are taken by surprise, by a misunderstanding of the Court, it is good ground for setting aside an order or judgment of the Court resulting from such mistake."

In this case, the ground of objection did not appear on the face of the record—the misunderstanding of counsel. The motion was filed at the same term.

In Dobbins v. DuPree, 36 Ga. 108, the court said on page 113:

> "The proceeding to accomplish the purpose of petitioner should have been **a simple motion** setting forth the grounds upon which the Court was asked to vacate the judgment, accompanied by **notice** in writing thereof to the opposite party."

In this case, the defect **did not appear on the face of the record.** It was alleged that the attorney for the defendant confessed judgment without authority. The judgment complained of was entered in **1861.** The motion to set it aside was filed in **1866.**

In Nolan v. State, 53 Ga. 137, the court said on page 138:

> "That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made **to set aside the verdict** on the ground of his **absence**, that motion should have been granted by the court. The defendant, however, did not make a motion to set aside the verdict, but made a mo-

tion in arrest of judgment. The 4629th section of the Code declares that no motion in arrest of judgment shall be sustained for any matter not affecting the real merits of the offense charged in the indictment. A motion in arrest of judgment is predicated on some defect which appears on the face of the record or pleadings.''

The defect complained of was **extrinsic** of the record. It was the absence of the defendant at the rendition of the verdict. A motion in arrest was made at the same term. It was overruled and a writ of error taken to the Supreme Court which affirmed the judgment, but held that a motion to set aside the verdict was the proper procedure. In accordance with this decision, a motion **to set aside the verdict** was filed and granted **at a subsequent term.**

In Fannin v. Durdin, 54 Ga. 476, the Court stated the true distinction between motions in arrest and motions to set aside judgments. That part of the opinion has been set forth in full on a preceding page.

The defect considered in this case was apparent on the face of the record, to-wit: the unconstitutionality of an Act of 1868. A motion to set aside was filed in 1873.

In Dugan v. McGlann, 60 Ga. 353, the court said:

''The judgment of a court of competent jurisdiction may be set aside for fraud, accident, or mistake, unmixed with the negligence or fault of the complaining party, by a decree in chancery, or in a court of law under our practice, by appropriate pleadings, and by making the necessary parties to the proceeding for that purpose, but can not be set aside upon either of those grounds upon motion, as was done in this case.''

In this case, there was a contest between judgment creditors. The oldest judgment was vacated on the

ground that there had been no service of the defendant. Then, the vacating judgment itself was vacated on a ground extrinsic of the record, i. e., that the exemplification purporting to show no service in the suit on which the oldest judgment was based was incomplete and fraudulent. The motion to vacate was filed at a subsequent term, but apparently **without notice** to the adverse parties.

In Tant v. Wigfall, 65 Ga. 412, the Court said on page 414:

> "At least they (the parties to the judgment) would be concluded in all courts except that which rendered the judgment, where only it could be attacked and set aside, or revoked, or in a court of chancery on a proper case made."

In this case, the judgment of an ordinary granting letters of administration was attempted to be attacked collaterally on a ground extrinsic of the record, that the decedent resided in a different county. The motion to vacate was filed at a **subsequent term.**

In Turner v. Jordan, 67 Ga. 604, the court said in the second headnote:

> "A judgment against an administrator, who was made a party by consent of counsel who did not represent him (though he had represented the intestate), and without his knowledge, before the expiration of the first year of his administration, could be set aside in a court of law with proper pleadings and with all parties in interest as parties to the motion, the motion being made **at the first term after notice to the administrator.**"

In this case, the defect alleged was **extrinsic** of the record, to-wit, that the attorney who undertook to agree that the administrator be made a party defendant before his year of exemption had elapsed was without authority

to do so. The motion to set aside the judgment was filed **at the next term.**

In Stewart v. Golden, 98 Ga. 479, the Court said on page 480:

> "It was insisted in the argument here, that the last judgment of the court of ordinary was void for two reasons: (1) that the defendant had no right to move to set aside the judgment, because they were not parties thereto and there was no privity between them and the deceased or the administrator or any one claiming under them; and (2) because the application was not made within three years after the judgment which it was sought to set aside had been rendered. The validity of the deed from Underwood, as administrator, under which the plaintiffs were seeking to recover, being dependent on the validity of the judgment appointing him administrator, the defendants were vitally interested in setting it aside. Why then were they not entitled to have it set aside in the same court that rendered it? If the facts pleaded by them were true, there could be no question that the judgment was void; and "a void judgment is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it." (Code, §3594.) "A judgment that is void may be attacked in any court, and by anybody." (Code, §3828.) We do not see, therefore, why the defendants did not have a right to go into the court that rendered the judgment and have it set aside."

In this case, the judgment of a court of ordinary granting letters of administration was attacked on the ground, not appearing on the record, that the deceased was a non-resident of this state and that the court had no jurisdiction. The judgment attacked was passed in **1861.** The motion to set aside the judgment was filed in **1890.**

In Regopoulas v. State, 116 Ga. 596, the court said on page 598:

> "It seems to be now settled, so far as the rulings of this court are concerned, that the only difference between a motion in arrest of judgment and a motion to set aside a judgment is as to the time within which each must be made. The former must be made during the term at which the judgment was rendered; and the latter may be made at any time within three years from the rendition of the judgment. The defect in the judgment sought to be set aside in the present case not being one which appeared upon the face of the record, the motion was properly overruled."

In this case, the defect was extrinsic of the record, being a failure to furnish the accused with a correct list of the witnesses upon whose testimony the accusation against him was founded. The motion was filed at a subsequent term.

In Ayer v. James, 120 Ga. 578, where a judgment was taken by reason of the providential absence of counsel, the Court said on page 582:

> "It would therefore seem that the client was reasonably diligent in looking after his case; and, if these facts had been properly presented in a motion to **vacate the verdict,** the trial judge might well, in the exercise of the wide discretion with which he is vested, have passed an order reinstating the case for a trial on its merits. That there may be no miscarriage of justice, we have thought proper to exercise the power, conferred upon us by statute, to **give direction** in the case, and have accordingly directed the court below to allow the defendant's motion to be **so amended** as to present all the facts showing diligence on his part, and pray for **appropriate** relief, in order that the trial judge may be

in a position to pass upon the real merits of the matter."

The alleged defect in this case was **extrinsic** of the record, being the taking of the judgment in the absence of the attorney for the defendant who was providentially prevented from attending and without means of communicating with the court. The motion was filed at the same term.

In Union Compress Co. v. Leffler, 122 Ga. 640, the court said on page 642:

"Lamar, J. (After stating the foregoing facts.) The judgment of every court of record may for good cause be opened, vacated, or amended during the term. It may be that the ground of the attack on the judgment is such that the complaining party can obtain relief only in a court of equity. Or, it may be that relief may be had at law and in the court which rendered the original judgment. And while the remedy by motion is limited, by the Civil Code, §5362, to cases where the defect appears on the face of the record, **the court is not deprived of the jurisdiction to grant relief against judgments irregularly or improperly obtained. IF THE IRREGULARITIES ARE OF A NATURE WHICH COULD HAVE BEEN TAKEN ADVANTAGE OF BY MOTION AT COMMON LAW (FANNIN v. DURDIN, 54 GA. 479), THE SAME RELIEF CAN NOW BE OBTAINED IN THIS STATE BY PETITION, TO WHICH ALL NECESSARY PARTIES HAVE BEEN MADE, AND WHERE EITHER A RULE TO SHOW CAUSE OR REGULAR PROCESS HAS BEEN ATTACHED AND DULY SERVED.** Turner v. Jordan, 67 Ga. 604; Dugan v. McGlann, 60 Ga. 353; Regopoulas v. State, 116 Ga. 597."

In this case, the defect alleged as the ground for vacating the judgment in a garnishment proceeding was

based upon defects in the garnishment in the original suit. The court held that this was a matter extrinsic of the record. The motion to set aside was presented by amending, at a **subsequent** term, a motion in arrest, and, therefore, the objection was not presented until a subsequent term.

In Davis v. Albritton, 127 Ga. 517, the court said on page 518:

> "And it has been repeatedly held that a judgment may be set aside, upon a proper case made, by a decree in chancery, or **by a proceeding at law, by petition with rule nisi or process, and service upon the necessary parties, instituted for that purpose in the court in which the judgment was rendered.** Civil Code, §3887; Duer v. Thweatt, 39 Ga. 578, and cases there cited; Dugan v. McGlann, 60 Ga. 353; Tant v. Wigfall, 65 Ga. 412; Turner v. Jordan, 67 Ga. 604; Union Compress Co. v. Leffler, 122 Ga. 640."

In this case, a judgment of a court of ordinary establishing a copy of a lost will was attacked on a ground extrinsic of the record, to-wit: that the testatrix was not a resident of the county in which the court was sitting. The judgment attacked was rendered at the **February Term, 1905.** The petition to set aside the judgment was filed at the **May Term, 1905.**

In Ford v. Clark, 129 Ga. 292, the court said on page 293:

> "There is no doubt that the judgment of a court of competent jurisdiction may be set aside, by the court which rendered it, for fraud and irregularity. Mobley v. Mobley, 9 Ga. 247. An examination of previous adjudications of this court discloses some apparent conflict as to the proper procedure. In Dugan v. McGlann, 60 Ga. 353, it was said that a judgment may be vacated for fraud, accident, or mistake, unmixed with the negligence or fault of the

complaining party, by decree in chancery, or in a court of law with appropriate pleadings, but can not be set aside on either of those grounds on motion. It has been repeatedly held by this court that a motion to set aside a judgment must be based on some defect which appears on the face of the record Regopoulas v. State, 116 Ga. 596. (42 S. E. 1014), and cit. **But not all motions to set aside judgments are necessarily based on matters appearing on the face of the record.** For example, any judgment or verdict entered up in consequence of perjury may be set aside "upon motion and notice to the adverse party." Civil Code, §5366. **HERE WE FIND CLEAR RECOGNITION OF THE RIGHT TO SET ASIDE A JUDGMENT, ON MOTION, FOR A DEFECT NOT APPARENT ON THE RECORD.** In Mobley v. Mobley, 9 Ga. 244, there was a motion made in the court of ordinary to set aside a judgment granting letters of dismission to an administrator, on the ground of fraud. Objection was made to the evidence offered to prove the fraud alleged, on the ground "that fraudulent acts, however flagrant, could not be given in evidence" in a motion to set aside a judgment. In the course of the discussion of this point, Nisbet, J., said: "Fraud in procuring a judgment is ground for its reversal, both at law and in equity; it is an irregularity which vacates it. It may be inquired into by the court which rendered the judgment." **At common law a motion to set aside a judgment could be predicated upon any irregularity in the judgment, whether appearing in the face of the record or not.** Judge McCay said, in Fannin v. Durdin, 54 Ga. 479, that the provisions of our Code were merely declaratory of the common law; but his remarks were said to be obiter dicta in the case of Regopoulas, supra. Be that as it may, we find that as early as the case cited from 9 Ga.,

it was considered proper procedure, to vacate a judgment procured by fraud, to file a petition addressed to the court wherein the judgment was rendered, distinctly alleging the specific fraud, and praying a rule against all the parties interested, to show cause why the judgment should not be set aside. When the rule was served, the court, on the day therein appointed, would proceed to hear evidence relating to the alleged fraud. This practice was approved in Turner v. Jordan, 67 Ga. 604. In the late case of Union Compress Co. v. Leffler, 122 Ga. 640 (50 S. E. 483), it was held: "In a proper proceeding by petition, with the rule nisi or process, and service upon the necessary parties, the courts of this State may exercise the jurisdiction, which obtained at common law, to set aside judgments for irregularities not appearing on the face of the record." See also Ayer v. James, 120 Ga. 578 (48 S. E. 154). **Whether such proceeding be technically a motion to set aside a judgment, or denominated by other appropriate name, it is certainly a proceeding in a court of law, and it would be immaterial to the parties haled into court whether they were cited to appear by a rule issued by the judge, or process in the name of the judge, issued by the clerk."**

In this case, the petition to set aside the verdict and judgment was based on a matter not appearing on the record, a fraud perpetrated by the plaintiff's attorney on the defendant. The plaintiff's attorney had stated to the defendant before filing his answer that it would be unnecessary for him to do so, and that the case would not go to trial. The petition to set aside the verdict and judgment was filed at the same term.

In Lyons v. State, 7 Ga. App. 50, at page 53, the court, after citing several of the cases above referred to, said: "This is not a motion to set aside a judgment, be-

cause there seems to have been no judgment rendered in the case. It is a petition to vacate and set aside a verdict, for an irregularity not appearing on the face of the record, on which a rule was issued and served; and it certainly constituted a proceeding in a court of law having full jurisdiction of the subject-matter alleged in the petition. **We know of no other full and adequate remedy for a party deprived of his right as alleged in this petition than the one adopted.''**

In this case, the defect alleged was extrinsic of the record, the absence of the defendant at the reception of the verdict. The motion to set aside was filed at the same term.

In Benford v. Shiver, 13 Ga. App. 135, the court said on page 138:

> ''It is to be borne in mind that at common law a motion to set aside a judgment could be based upon irregularities in the judgment whether these appeared in the face of the record or not. The true rule seems to be, that 'In a proper proceeding by petition with rule nisi or process, and service upon the necessary parties, the courts of this state may exercise the jurisdiction, which obtained at common law, to set aside judgments for irregularities not appearing on the face of the record.' Union Compress Co. v. Leffler, 122 Ga. 640 (50 S. E. 483). See also, Turner v. Jordan, 67 Ga. 604; Dobbins v. Dupree, 39 Ga. 394; Ayer v. James, 120 Ga. 578 (48 S. E. 154).''

In this case, the defect was the rendition of the judgment during the excusable absence of the defendant on providential grounds, the dangerous illness of his child The motion to set aside the judgment was filed at the same term.

It is respectfully submitted that the cases above reviewed establish beyond question the correctness of the procedure adopted in this case. They show beyond controversy that the decisions to the effect that a motion to set aside a judgment must be based upon some defect which appears on the face of the record do not militate against our contention, because this court by its decisions has recognized and established as the proper procedure in a case where the defect is extrinsic of the record, a written petition setting forth the defects relied upon, with a rule nisi or process served upon the opposite parties. That procedure was followed in the present case.

Not only is the procedure in the present case based upon the strongest authority in the decisions of this court, but it results from and is approved by the **very necessity** of the case. **The interpretation placed by this court upon §§5957 and 5958 of the Code left no remedy for cases where a judgment was defective by reason of matters not appearing on the record.** The right of appeal was not an effective remedy because the matter invalidating the judgment might not be discovered until after the time allowed for suing out a writ of error had expired, and, while a bill in equity might be available in civil matters, it is very doubtul whether it would be available at all in a criminal case. In order to supply this deficiency and to carry out the provisions of the Code prescribing that for every right there should be a remedy, this court evolved and has established in permanent and unquestionable form the practise pursued in the present case.

The absolute necessity for this practice is illustrated with peculiar force by the present case. Here, the movant wished to urge against the verdict that he was absent at its reception. But this is a matter which not only is not shown by the record, but which this court has explicitly and repeatedly held **has no place on the record.**

Rawlins v. Mitchell, 127 Ga. 24.
Franks v. State, 120 Ga. 495.
Smith v. State, 60 Ga. 430.
Nolan v. State, 53 Ga. 137.

How, then, could the point be made except in the manner in which it has been made?

Moreover, if, as distinctly stated by Judge Lamar in Union Compress Co. v. Leffler, 122 Ga. 640, the procedure approved in that case (which is the procedure pursued in the instant case) is the modern substitute for the procedure provided by the common law for taking advantage of defects extrinsic of the record, can there be any question that the common law limitation for such procedure, which was simply "a reasonable time" (Fannin v. Durdin, 54 Ga. at 480) should be adopted as part of the procedure, and should control?

As to what was a reasonable time for filing the present motion, it would seem that in a criminal case where sentence of death had been pronounced, the motion, being based upon grounds that totally invalidated the whole proceeding, could be filed at any time prior to the execution of sentence—certainly, when it is remembered that the basic maxim of all criminal law and procedure is "In favorem vitae, libertatis et innocentae omnia praesumuntur," the presumption is always in favor of life, liberty and innocence. Trayner Leg. Max. State v. Bilausky, 3 Minn. 246.

As we have shown, our procedure is based upon established rules, of which, in order to sustain our position, we are under no necessity of seeking or asking any amendment or change. However, in order to give this court an opportunity to investigate the whole subject without restriction from its former decisions, and because it is believed that the decisions interpreting §§5957 and 5958 of the Code are unsound, we respectfully re-

quest permission to review these and any other similar decisions:

Dugan v. McGlann, 60 Ga. 353.
Pulliam v. Dillard, 71 Ga. 598.
Artope v. Barker, 74 Ga. 462.
Clark's Cove Guano Co. v. Steed, 92 Ga. 440.
Mize v. Americus Mfg. & Imp. Co., 109 Ga. 359.
Regopoulas v. State, 116 Ga. 596.

The grounds on which we ask a review of these decisions may be stated in brief as follows:

1. Under the practice at common law, as stated by Judge McCay in Fannin v. Durdin, supra, a motion in arrest of judgment was the proper remedy for reaching defects which appeared on the face of the record, and a motion to set aside a judgment was the proper procedure where the defect did not appear on the face of the record. It was necessary to file the former at the same term and before the judgment was entered. The latter could be filed within a reasonable time.

2. Prior to the Code of 1863, the common law practice prevailed in Georgia, where it was thoroughly established.

Mobley v. Mobley, 9 Ga. 247.
Beall v. Blake, 13 Ga. 217.
Winter v. State, 18 Ga. 275.

3. The Code of 1863 was intended and adopted as a codification of the common law, and the intention of the codifiers is to be presumed to be the enactment of the common law. **Consequently the Code is to be interpreted in the light of the common law.**

Davis v. First National Bank, 139 Ga. 702.
Bush v. McCarty Co. 127 Ga. 308.
Calhoun v. Little, 106 Ga. 336.
Ocean Steamship Co. v. Way, 90 Ga. 747.

4. The interpretation put upon §§5957 and 5958 of the Code has led to an incongruous result, the very incongruity of which is conclusive proof that such inter-

pretation was not the intention of the codifiers or the legislature, and which is wholly out of place in a modern system of laws professing to be founded on logic and reason. As interpreted, these sections mean that a litigant may attack a judgment for a defect apparent on the face of the record by a motion in arrest of judgment, but he is required to file this motion at the same term at which the judgment was rendered. **But if he will merely change the name of his pleading, and instead of calling it a "motion in arrest," will designate it as a motion to set aside" the judgment, he may then make the same objection, on the same grounds in the same manner and in the same terms, with this important and substantial advantage that he will be allowed three years to do so.** In other words, if the motion is called a "motion in arrest of judgment," it must be filed at the same term, but if it be called a "motion to set aside" a judgment, it may be filed at any time within three years. By merely changing the name of his pleading from a "motion in arrest" to a "motion to set aside" the judgment, a party gains three years time in which to proceed. It is submitted that this distinction makes a fetich of mere words, and leads to a wholly arbitrary and unreasonable result, utterly out of keeping with the modern trend of legislation and judicial interpretation, which is to exalt substance over form and subordinate form to substance. The result is incongruous for the reason that it has introduced into the Georgia practice two methods of attacking a judgment for defects apparent on the face of the record which differ in no particular whatever except in mere name, but with this important consequence attendant on the use of the respective names, that if the one name be used, the movant has only a few days or weeks to file his motion, whereas if he uses the other name he is allowed three years.

5. In the case of Calhoun v. Little, 106 Ga. 336, this Court in the third headnote laid down the rule for in-

terpretation of the Code as follows: where a section of the Code has been codified from a decision of this Court, **it will be construed in the light of the source from which it came,** unless the language of the section imperatively demands a different construction. This rule applies to the interpretation of §§5957 and 5958. While they do not purport to be a codification of any particular decision, they do purport, under the terms of the act providing for the code, to be a reenactment of the common, law, and, therefore, should be interpreted in the light of the common law. This has evidently not been done. The result worked out by the interpretation placed upon these sections has overturned the sound and rational practice of the common law and substituted in its place a practice based upon **mere names and purely superficial distinctions.** Furthermore, by holding that the motion to set aside a judgment can only be based upon defects appearing on the face of the record, the practice in this state was stripped of any procedure for attacking a defect not apparent on the face of the record, and drove the court to the necessity of formulating in the case of Union Compress Co. v. Leffler, and like cases, **a substitute for the old common law procedure which had been destroyed.** This substitute remedy itself, however, differed from the motion to set aside **only in name.** So that one distinction that was purely nominal in its nature forced the court to adopt another distinction, also **purely nominal.**

The decisions of this court indicate that for a long time it has seen with regret the unsoundness and absurdity of the maze of mere verbal distinctions in which the practice referred to has become enmeshed. It was this unsoundness which led Mr. Justice Cobb in the Regopoulas case, supra, while comparing the cases of Turner v. Jordan and Dugan v. McGlann, to confess that it was very hard to perceive any distinction between the procedure in the former case and an ordinary motion to

set aside a judgment, and compelled him to adopt as the final basis of his opinion, not any distinction based upon reason and logic, but the bald proposition that the court was bound by its earlier rulings. It was this same unsoundness which led Mr. Justice Little in the Regopoulas case to concur specially, stating that he agreed to the judgment only because he was bound to do so by the early adjucations pointed out by Mr. Justice Cobb in his opinion. It was this same unsoundness that led this court in the case of Ayer v. James, 120 Ga. 578, in which it reversed the lower court because it granted a motion to set aside a judgment on the ground of matters not appearing on the face of the record, to give direction, in order, as it stated, to avoid a "**miscarriage of justice**", that the losing party might have leave to amend his motion and **change its name from a "motion to set aside the judgment" to a "motion to vacate the verdict."**

It was the same unsoundness which led this court in Ford v. Clark, 129 Ga. 292, speaking through Mr. Justice Evans, to call attention to the utter insubstantiality of the attempted distinction in the following words, on page 294: "Whether such proceeding (motion to set aside the judgment for matters extrinsic of the record) be technically a motion to set aside a judgment, or denominated by other appropriate name, it is certainly a proceeding in a court of law, and it would be immaterial to the parties haled into court whether they were cited to appear by a rule issued by the judge, or process in the name of the judge, issued by the clerk." This statement shows that the court was fully alive to the absurdity in which the practice referred to is now entangled. We submit that the time is ripe for the court to take the whole subject under consideration, review the decisions in which the trouble originated, and formulate a rational and effective procedure.

However, whether this Court, upon review, decides to overrule these decisions or not, it is immaterial to the

plaintiff in error, because in either event, the procedure in this case is based upon unquestioned and unquestionable precedents now existing in the decisions of this Court.

The second ground of the state's demurrer was as follows:

> "Said motion should be dismissed because it affirmatively appears from paragraph 6 of the motion to set aside the verdict, that the defendant Leo M. Frank made a motion for a new trial, which said motion was denied by the Court, and as a matter of law if said verdict was rendered at a time when this Defendant was not present in Court, such irregularity should have been included among the grounds of the motion for a new trial, and as a matter of law is conclusively presumed to have been incorporated and embodied in said motion for a new trial, which said motion as aforesaid was heard and denied, as is shown by this petition.

It is respectfully submitted that so far from there being any conclusive presumption that the matters set up in the present motion were included in the motion for a new trial, the established practice of this state forbids that it should have been done. The matters alleged in the motion to set aside the verdict are not the proper subject matter for a motion for a new trial. The effect of the sustaining of the motion to set aside the verdict would amount in practical effect to a discharge and the defendant in error could not be tried again. Nolan v. State, 55 Ga. 521. Oliveros v. State, 120 Ga. 237. Bagwell v. State, 129 Ga. 170. But if a motion for a new trial were granted, the result would be, of course, a new trial. The constitutional rule against second jeopardy

would, in such a case, be inapplicable, because the new trial would be granted on the defendant's own motion. It appears, therefore, that the two remedies are substantially different in their consequences. As was said by Judge Hill in Lyons v. State, 7 Ga. App. 50, at 53, the error (reception of verdict in defendant's absence) is hardly one that would be proper matter in a motion for a new trial, for **if the defendant were compelled to resort to a motion for a new trial to correct such error, he would be prevented from asserting another great constitutional right—the right not to be again placed in jeopardy for the same offense.**

In Nolan v. State, 55 Ga. 521, in the 5th headnote, the court said: "His motion to set aside the verdict for such cause is distinguishable from a motion for a new trial, and consequently, does not subject him to be again put in jeopardy as though a new trial had been applied for and granted. In the present case a new trial was not a necessary incident of setting aside the verdict, and in point of fact, was neither applied for by the party nor expressly ordered by the court. The former jeopardy is clear, and the prisoner's claim to protection comes within the declaration of fundamental principles in the constitution of 1868: Code, section 5000."

In recent case of Potts v. Atlanta, 140 Ga. at page 433, this court laid down a comprehensive definition of the scope of a motion for a new trial. It was said: "A motion for new trial reaches the errors in the finding of the jury, or such errors of the court as may lead to the finding, but is not the proper method of correcting errors in a decree or judgment."

Under this principle, this Court has repeatedly held that the overruling of a demurrer is no ground for a motion for a new trial.

Griffin v. Justice, 17 Ga. 97.
Artope v. Barker, 72 Ga. 186.
DuBarry-Baya Line v. Austin, 76 Ga. 306.

Rogers v. Rogers, 78 Ga. 688.
Nichols v. Popwell, 80 Ga. 60.
Wilbanks v. Untriner, 98 Ga. 801.
Shuman v. Smith, 100 Ga. at 416.
Holliman v. Bradley Co., 106 Ga. 156.
Cleveland v. State, 109 Ga. 265.
Carter v. Johnson, 112 Ga. 494.
Savannah Storage & Ry. Co. v. Renfroe, 115 Ga. 774.
Mayor & Council v. Dudley, 2 Ga. App. 762.

Overruling a demurrer to an indictment is not ground for a motion for a new trial.

Robson v. State, 83 Ga. 166.
Flemister v. State, 81 Ga. 768.
Taylor v. State, 105 Ga. 846.
Cleveland v. State, 109 Ga. 265.
Heard v. State, 113 Ga. 448.
Carthorn v. State, 119 Ga. 402.
Sconyers v. State, 6 Ga. App. 804.
Fryer v. State, 12 Ga. App. 533.

Refusal to arrest judgment is not ground for a new trial.

Watson v. State, 64 Ga. 61.
Darden v. State, 74 Ga. 842.
Gardner v. State, 81 Ga. 144.
Gardner v. State, 81 Ga. 144.
Stokes v. State, 84 Ga. 258.
Gaines v. State, 108 Ga. 772.
Boswell v. State, 114 Ga. 41.
Morris v. Wafford, 114 Ga. 935.
Martin v. State, 115 Ga. 258.

That the judgment does not conform to the verdict is not a ground for a new trial.

Brand v. Kennedy, 71 Ga. 709.

Denham v. Walker, 93 Ga. 497.
Potter v. Atlanta, 140 Ga. 431.

The overruling of a plea to the jurisdiction is not a ground for new trial.

Daniel v. State, 115 Ga. 205.

The improper allowance of an amendment is not a ground for a new trial.

Bullock v. Cordele Sash Co., 114 Ga. 627.

A ruling made at chambers is not a ground for a new trial.

Moreland v. Stevens, 64 Ga. 289.

The imposition of an unauthorized penalty is not a ground for a new trial.

Brantley v. State, 87 Ga. 149.

A refusal to sustain a motion to quash an indictment is not a ground for a new trial.

Hancock v. State, 114 Ga. 439.

That the sentence is excessive is not a ground for a new trial.

Montross v. State, 72 Ga. 262.
Baldwin v. State, 75 Ga. 482.
Burgamy v. State, 114 Ga. 852.
Sturkey v. State, 116 Ga. 526.
Bellinger v. State, 116 Ga. 545.
Rumsey v. State, 2 Ga. App. 620.

We submit, therefore, that inasmuch as, if sustained, the point raised by the defendant that he had not been present at the reception of the verdict, would eventuate in a discharge, and not in a second trial, the point had no proper place in a motion for a new trial, unless he

wished to waive his constitutional protection against being placed in second jeopardy. Certainly, there could be no conclusive presumption, as claimed by the state, that such point was embraced in his motion for a new trial.

The 3rd, 4th, and 6th grounds of the state's demurrer made substantially the same point and are grouped together for discussion. They were as follows:

> 3. "Said motion should be dismissed because same shows a course of conduct on the part of the defendant, Leo M. Frank which amounts to an estoppel."
>
> 4. "Said motion should be dismissed because this petition and the record of the decision of the case of Leo M. Frank against the State of Georgia rendered by the Supreme Court of Georgia, affirmatively shows a course of conduct that amounts to and constitutes an estoppel."
>
> 6. "Said motion should be dismissed because this petition in conjunction with the decision of the Supreme Court of Georgia in the case of Leo M. Frank against the State of Georgia, affirmatively shows that said Frank after a knowledge of this waiver (of his presence) on the part of his counsel acquiesced in the same and took steps affirmatively indicating a waiver of such conduct on the part of his counsel."

We wish to say at the outset of the discussion of these grounds, that it is difficult to conceive on what theory it can be claimed that a defendant on trial for his life can be estopped to assert for his protection any right given him by law. An application of the doctrine of estoppel to a defendant in a capital case, or indeed in any criminal case, is a novel and startling suggestion. It was sup-

posed that the doctrine of estoppel and election were confined to civil cases.

A careful and exhaustive examination of all the standard text books, encyclopedias and compilations on criminal law procedure has failed, with one immaterial exception which will be noted hereafter, to disclose the slightest suggestion of the existence of any rule which would operate by virtue of the doctrine of estoppel and election of remedies to prevent a defendant in a criminal case from asserting and insisting upon any right whatever. We have gone over these authorities carefully from the earliest time to the present, and have been unable to find a single case dealing with the objection made by the state in the above quoted grounds. We have not been able to find in any text book or decision the slightest intimation supporting the contention of the state. Indeed, it appears, so far as these authorities show, that throughout the centuries of English and American criminal law, and the vast territory through which these laws have operated, this contention has never been even presented to any court before, much less decided adversely to the defendant. Under the liberal principles that underlie modern procedure, and under the general doctrine that all criminal procedure is to be interpreted in favor of life and liberty, it would seem that the burden would rest upon the state of producing the authority or indicating the rule under which its contention is made, and in the event of its failure so to do, the general rule must operate that the defendant is entitled to present and urge any and all rights given him by law, at all times and under all circumstances, when his motion is timely made.

In the great mass of law on the subject of criminal procedure, and among the thousands of decisions on that subject, the only instance we can find of the application in any way of the doctrine of estoppel or election in a criminal proceeding is the ancient rule adopted in the Court of King's Bench to the effect that the making of

a motion in arrest of judgment would operate as a waiver of the right to file subsequently a motion for a new trial. This rule of the Court of King's Bench has been followed by a few courts in criminal cases, notably in the State of Tennessee.

So far as we are able to discover, these are the only instances where the doctrine of estoppel or election has ever been applied in a criminal case against the defendant. In 2 Bishop's New Criminal Procedure, Volume 2, §1268 (3), it is stated that a motion in arrest waives the right to file a motion for a new trial. The following cases are cited in support of the doctrine:

Bates v. Reiskenhianzer, 9 Ind. 178.
Gillespie v. State, 9 Ind. 380.
Republica v. Lacaze, 2 Dall. 118.
Smith v. Porter, 5 Ind. 429.
Philpot v. Page, 4 B. & C. 160.
Rex v. White, 1 Bur. 333.
McComas v. State, 11 Mo. 116.
Longfellow v. State, 10 Neb. 105.
Hollingsworth v. State, 7 Ga. App. 16; 65 S. E. 1077.
Hall v. State, 110 Tenn. 365; 75 S. W. 716.
State v. Griffie, 118 Mo. 188; 23 S. W. 878.
Palmer v. State, 121 Tenn. 65; 118 S. W. 1022.
Miller v. State, 139 Wisc. 57; 119 N. W. 850.

An examination of these cases shows that they do not all sustain the text. The last cited, under the influence of a code, state a contrary rule.

In Hall v. State, supra, 110 Tenn. 365, the Tennessee Supreme Court said:

"There was in this case an indictment and conviction for keeping a house of prostitution, to the common nuisance of the community. A motion for a new trial and in arrest of judgment was made. This having been overruled, the defendant appealed, and

has assigned errors upon the action of the trial judge."

"The practice in this state is well settled that a motion in arrest of judgment made before a motion for a new trial waives the latter motion. This is upon the ground that **in regular order the latter motion precedes the former, and the making of the motion in arrest, being in the nature of an advanced step, waives that which, in pleading, should have gone before.** Snapp v. Moore, 2 Tenn. 236; Ins. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140; Freeman v. Railroad, 107 Tenn. 340, 64 S. W. 1. Upon examination it will be found that this rule is recognized and enforced by many courts of high authority. Cincinnati v. Case, 122 Ind. 310, 23 N. E. 797, Hall v. Nees, 27 Ill. 411; Craig v. Miss. Mills, 12 Mo. App. 585; Candler v. Hammond, 23 Ga. 493; Hipp v. Ingram, 3 Tex. 17; Respublica v. Lacraze, 2 Dall. 118, I. L. Ed. 313. In his work on General Practice, Judge Elliott (volume 2, §995) says: "The right to move for a new trial may be waived by agreement in advance, or by inconsistent acts, or by neglecting to take the proper steps. Thus it has been held moving in arrest of judgment before moving for a new trial is a waiver of the latter motion." In support of this text, many cases are cited by the author. In this state, the rule goes back, at least, to 2 Overton's Reports. It is true opinions heretofore published have been delivered in civil cases, yet this has not been indicated that the application of the rule was not equally proper in criminal cases. There is the same necessity for orderly procedure in the latter as in the former cases, and no reason can be assigned why the practice in this regard should be different in the two classes. In Texas, the rule was of legislative as well as judicial recognition, and was enforced in criminal as well as civil cases (State v. Mann, 13

Tex. 62), and it existed until that state adopted its Code of Criminal Procedure, and changed it so far as the former class of these cases was concerned. Mathews v. State, 33 Tex. 102."

In the State of Georgia, the law upon this subject has been clearly and definitely established. The old rule that the making of a motion in arrest waives the right to file a motion for a new trial has been long since rejected in this state, if it ever existed.

In the case of Candler v. Hammond, 23 Ga. 493, a civil case, the defendant had moved in arrest of judgment and the motion had been granted. After the court had reversed this judgment, and at a subsequent term, the defendant moved for a new trial. The trial court overruled the motion and was reversed by the Supreme court. That Court held that even if the old rule in some of the English courts that a motion in arrest waived a motion for a new trial prevailed in Georgia, the facts of this particular case created an extraordinary situation in which the defendant would be allowed to move for a new trial.

In discussing the rule of the English courts referred to, the Court said on page 496:

"The presiding Judge in the Court below put his refusal of the new trial on two grounds only, and those grounds had no reference to the merits of the application. The first ground was that an unsuccessful motion in arrest of judgment had been made in the cause; and the second ground was, that no motion for a new trial was made at the Term of the Court when the trial was had and no brief of evidence was then filed.

"(1). Whether a motion for a new trial can be made in the Courts in England, after an unsuccessful motion in arrest of judgment, is more a matter of practice than a legal rule. The practice is different in the different Courts. In the Court of Exchequer, a motion in arrest of judgment, was

refused, because it was not made within the four first days of the Term, next after the trial of the cause, and because it was made after a rule nisi for a new trial had been disposed of. Lane and another vs. Crockett, 7 Price 566. In King's Bench a motion in arrest of judgment may be made at any time before judgment entered up, and even after a rule for a new trial has been discharged. I. Sellon's Pract. 497. In common pleas, a motion in arrest of judgment may be made after a new trial has been moved and refused. Ib. 482. This is the practice of these several Courts in regard to motions in arrest of judgment. The rule of practice is somewhat different in relation to motions for new trial. In the Court of Exchequer, in the case already cited from Price, the Court said that the motion in arrest of judgment and for a new trial might have been submitted in the alternative. This remark cannot be considered as evidence of a settled practice in that Court, but it seems to me that it would be a judicious rule, calculated to promote the ends of justice. In Sellon's practice of the Court of King's Bench and Common Pleas, the remark is made that a motion in arrest of judgment may be made after a new trial has been moved for and refused, but not vice versa. Hence, according to that authority, a motion for a new trial cannot be made after a motion in arrest of judgment. In extraordinary cases, however, it has been held that a motion for a new trial will be entertained after a motion in arrest of judgment. Tidd's Prac. 913."

This statement of the English practice, so far as it has any bearing at all on the present case, sustains the position of the plaintiff in error. For it clearly appears that while the practice in the Court of King's Bench, which was a court of criminal jurisdiction, forbade the making of a motion or a new trial after the refusal of a

motion in arrest of judgment, **its practice distinctly allowed the contrary to be done.** That is to say, that after a motion for a new trial had been made and refused, a motion in arrest of judgment might then be presented properly. The motion in arrest is, in many respects, analogous to the motion to set aside the verdict. They strongly resemble each other and differ from a motion for a new trial in this respect, that the granting of either does not generally result in a new trial, but in a discharge of the defendant, whereas a motion for a new trial results necessarily in a new trial. Conceding, therefore, the analogy between the motion in arrest and the motion to set aside the verdict, the law as quoted in this case from Sellon's Practice sustains the procedure adopted by the plaintiff in error.

In the Tennessee cases cited above, and particularly in the case of Hall v. State, 110 Tenn. 365, Chief Justice Beard stated the reason of the rule to be that **a motion in arrest of judgment presupposed the validity of the verdict,** and, therefore, in logical order, could not precede a motion for a new trial, which denies the validity of the verdict. **The inevitable corollary of this statement is that a motion for a new trial may, and, indeed, should precede the motion in arrest.**

The motion to set aside the verdict, however, no less than the motion for a new trial challenges the validity of the verdict, and, therefore, there can be no question of the logical order of precedence between them. Both are predicated on the invalidity of the verdict, and it would seem to be wholly immaterial, as a matter of logical sequence, which was presented first.

In the state of Georgia, the English rule referred to has been distinctly abandoned in the following cases decided subsequently to the case of Candler v. Hammond, supra, to-wit:

Lake v. Hardee, 55 Ga. 667.

Hayden v. Johnson, 59 Ga. 104.
Loudon v. Coleman, 62 Ga. 146.

In Lake v. Hardee, 55 Ga. 667, the court said in the first headnote:

> "Where objections arising upon the face of the verdict are urged against the making of a decree and are overruled, the same matters, if appropriate to a motion for a new trial, may be included, with others, in such motion subsequently made during the term. The prior decision on the objections will be considered as rendered subject to a more formal and regular examination of the several matters by motion for a new trial."

In Hayden v. Johnson, 59 Ga. 104, the fourth headnote was:

> "A motion for a new trial which is otherwise in time is not too late because made after a previous motion to set aside the judgment has been denied."

Judge Bleckley rendering the opinion said on page 108:

> "The motion for a new trial was made at the term when the trial was had. That is the only limitation prescribed by the Code, as to time, in ordinary cases. Section 3719. The prior motion to set aside the judgment was no bar; surely not, when that motion was disposed of before the judgment took its final form, throwing its whole weight on the specific property."

In Loudon v. Coleman, 62 Ga. 146, the court said in the second headnote:

> "In Georgia, a new trial may be moved for after a motion in arrest of judgment has been overruled; provided both motions are made during the term at which the verdict was rendered."

On page 154, the court speaking through Judge Bleckley said:

> "The motion in arrest of judgment was made and overruled at the term of the court at which the verdict was rendered. The motion for a new trial was then made during the same term. In Georgia practice it is allowable to follow an unsuccessful motion of the former class with a motion of the latter class. 59 Ga., 105; 55 Ib., 667; 23 Ib., 493."

In Hollingsworth v. State, 7 Ga. App. 16, the court said in the 3 headnote:

> "A defendant in a criminal case may move in arrest of judgment, upon his conviction, where it appears from the indictment that the alleged offense is barred by the statute of limitations, and no exception to remove the bar is stated in the indictment. Still, this right is not exclusive of the right of the defendant, at his option, to move for a new trial upon the ground that his conviction was the result of evidence illegally admitted over his objection."

It thus appears that the old practice in the Court of Exchequer is not recognized and does not exist in Georgia.

The only instance that we have been able to find where the doctrine of election of remedies was ever sought to be applied in a criminal in this state is where, under certain rare conditions, the court requires the state to elect under which one of several counts in an indictment it will conduct the prosecution.

Sutton v. State, 124 Ga. 815.

So far from the criminal procedure of this State, recognizing the doctrine of election this Court, in the case of Hoye v. State, 39 Ga. 718, said:

> "But the rule (waiver of irregularities in a civil

case by failure to object) is different in a criminal case involving the life or liberty of the defendant. **He waives nothing by implication or intendment.**''

There are a number of sections in the Georgia Code on the subject of election of remedies, but they are all confined to civil cases and apply only to the plaintiff. In none of these sections which comprise in themselves the entire body of the statutory law of the State on this subject is there to be found the slightest suggestion supporting the contention of the prosecution in this case.

We set out below in their numerical order all the sections of the Code referred to. They are:

§3219	§4331	§4599	§5249
§3220	§4407	§4609	§5255
§3588	§4500	§4610	§5256
§4045	§4540	§5248	§5522

''§3219. (2690) **Pursuing two remedies.** The creditor can not pursue the person and property of the debtor at the same time, except in cases specially provided for; but the process last sued out shall be void.''

''§3220. (§2691.) **Compulsory election.** As among themselves creditors must so prosecute their own rights as not unnecessarily to jeopardize the rights of others; hence a creditor having a lien on two funds of the debtor, equally accessible to him, will be compelled to pursue the one on which other creditors have no lien.''

''§3588. (§3016.) **Suit on breach of contract.** When the contract is for a year, and the employer wrongfully discharges the agent before the end of the year, the agent may either sue immediately for any special injury from the breach of the contract, or, treating the contract as rescinded, may sue for the value of the services rendered, or he may wait

till the expiration of the year and sue for and recover his entire wages."

"§4045. (§3469.) **Provision in lieu of year's support.** A testator may, by his will, make a provision in lieu of this support for twelve months; in which case the widow may elect, under the same rules as regulated her election of dower."

"§4331. (§3737.) **Plaintiff required to elect between suits.** No suitor is entitled to prosecute two actions in the courts of this State at the same time, for the same cause, and against the same party, and in such a case the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously; and the pendency of the former is a good defense to the latter, if commenced at different times."

"§4407. (§3811.) **Cases of election.** When a transaction partakes of the nature both of a tort and a contract, the party complainant may waive the one and rely solely upon the other."

"§4500. (§3903.) **Former recovery, etc.** Former recovery, and the pendency of another suit, are also good defenses, and subject to the same rules as when applied to contracts. Sometimes a party may sue either for the tort or upon the contract; in such cases he must elect on which he will proceed."

"§4540. (§3943.) **Concurrent jurisdiction.** Where law and equity have concurrent jurisdiction, the court first taking will retain it, unless a good reason be given for the interference of equity."

"§4599. (§4002.) **Election.** In marshaling the assets, the court will look to the equities of creditors, and, where cases arise for election, will compel the parties to elect."

"§4609. (§4012.) **Election.** A case of election arises whenever a person is entitled to one or two benefits, to each of which he has legal title, but to

enforce both would be unconscientious and inequitable to others having claims upon the same property or fund. In such cases equity has jurisdiction to compel an election."

"§4610. (§4013.) **By a legatee.** When a testator has affected to give property not his own, and has given a benefit to a person to whom that property belongs, the devisee or legatee must elect either to take under or against the instrument. The rule does not apply if the will itself, from other causes, is not efficient in passing the title to the property of the devisee or legatee; nor if the testator had an interest in such property upon which the will may operate; nor if the bequest shows that the testator intended to bequeath only in the event that his own title was good; nor if the benefit given to the party called upon to elect is not from testator's own property, but by virtue of a power of appointment in him."

"§5248. (§4688.) **How dower assigned in land partly paid for.** Dower may be assigned in lands held under deed, bond for titles, or other instrument in writing having like effect, where a portion of the purchase-money has been paid, but the estate in dower shall be liable for the unpaid purchase-money where the vendee held under bond for titles or other instrument having the same effect, or under deed where contemporaneously with the execution of the deed the vendee encumbered the land with a mortgage for the purchase-money."

"§5249. (§4689.) **How barred.** Dower may be barred—

1. By provisions made prior to the marriage and accepted by the wife in lieu of dower.

2. By a provision made by deed or will, and accepted by the wife after the husband's death, expressly in lieu of dower, or where the intention of

the husband is plain and manifest that it shall be in lieu of dower.

3. By the election of the widow, within twelve months from the grant of letters testamentary or of administration on the husband's estate, to take a child's part of the real estate in lieu of dower.

4. By a failure to apply for the dower for seven years from the death of the husband.

5. By the wife's deed with her husband to lands to which the title came through her.

6. By the adultery of the wife unpardoned by the husband."

"§5255. (§4695.) **Dower in proceeds of sale.** With the assent of the executor or administrator of the estate, the widow may elect a life-estate in one third part of the proceeds of the sales of the land, or any distinct tract or tracts of land, in lieu of the dower in such land. In which event, such third part of the proceeds of the sale shall be invested by the executor or administrator under the direction of the ordinary where his returns are made, and the annual income thereof paid to the widow during her life."

"§5256. (§4696.) **Absolute estate in specified sum.** With the assent of the executor or administrator of the estate, and the aproval of the ordinary, the widow may elect, in lieu of her dower, an amount in money to belong absolutely to her, to be estimated and determined by the commissioners appointed to assign dower, and whose report shall be subject to the same objections as are admeasurements of dower in land. Both before the ordinary and on the return of the report of the commissioners, any person interested in the question shall be allowed to become a party and be heard. The amount so awarded shall be paid in reference to all other claims out of the proceeds of the sale of the land."

"§5522. (§4945.) **Concurrent suits.** A plaintiff

may pursue any number of consistent concurrent remedies against different persons until he obtains a satisfaction from some of them.''

In the penal Code of Georgia, there are no provisions whatever bearing on the subject of elections of remedies, or estoppel.

On the subject of waiver, §5 provides:

''§5. (§5.) **Waiver of law.** Laws made for the preservation of public order or good morals can not be done away with or abrogated by any agreement; but a person may waive or renounce what the law has established in his favor, when he does not thereby injure others, or affect the public interest.''

Having reviewed these sections, we repeat that in none of them, though including in themselves the entire body of the statutory law of this State, is there the slightest shadow of support for the contention of the prosecution made in this case.

Even conceding that the doctrines of election of remedies and estoppel apply to criminal cases, it is apparent that there is no such conflict in the actual operation of a motion for a new trial and a motion to set aside a verdict as would bring the doctrine of election into play. The decisions of this state have established the propositions that in a case where a motion for a new trial and to set aside a verdict, or judgment are pending that, first, the court has the right, in its discretion, to take up these motions in whatever order it deems best, and, second, that if the court takes up the motion for a new trial, and grants the same, the verdict and judgment are thereby set aside and the other motion to set aside the verdict or judgment becomes at once inoperative.

Habersham v. Wetter, 59 Ga. 11.

Williams v. State, 121 Ga. 579.

In the case of Habersham v. Wetter, supra, the court in the second headnote said:

> "Where there is a motion for new trial, and also a motion in arrest of judgment, both made by the same party and pending at the same time, and the new trial is granted, there is no longer any verdict on which to base a judgment to be arrested, and a dismissal of the motion in arrest is not such a final judgment as that a writ of error will lie therefrom to this court."

In the case of Williams v. State, supra, a headnote decision, the court, speaking through Presiding Justice Fish, said:

> "Where one convicted of a criminal offense made a motion in arrest of judgment and a motion for a new trial, and insisted upon both motions, it was not error for the judge, over the objection of the movant, to first hear and decide the motion for new trial, though the filing of the motion in arrest was prior to the filing of the motion for new trial. And where under such circumstances a new trial was granted, it was not error to then dismiss the motion in arrest, as the effect of the grant of the new trial was to set aside the judgment.

It is a necessary corollary from these decisions that if the motion for a new trial be first taken up and denied, the court will then be at liberty to take up and pass upon the motion to set aside.

There are two precedents in this state which control the case at bar and justify beyond controversy the practice pursued. They are:

Nolan v. State, 53 Ga. 137.

Rawlins v. Mitchell, 127 Ga. 24.

See also:

Hopkins v. State, 6 Ga. App. 403.

In Nolan v. State, 53 Ga. 137, a motion in arrest of judgment had been filed at the first term on the ground that the verdict had been received in the absence of the defendant and his counsel. This motion was overruled by the trial court and its judgment was affirmed by the Supreme court. In rendering its judgment, the court said:

> "That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, **and if a motion had been made to set aside the verdict on the ground of his absence, that motion should have been granted by the court.** The defendant, however, did not make a motion to set aside the verdict, but made a motion in arrest of judgment. The 4629th section of the Code declares that no motion in arrest of judgment shall be sustained for any matter not affecting the real merits of the offense charged in the indictment. A motion in arrest of judgment is predicated on some defect which appears on the face of the record or pleadings.
>
> "It has never been the practice of the courts of this state, so far as we are advised, to require that the fact of the defendant's presence at the time of the rendition of the verdict, should be entered on the record, and made a part thereof. If the defendant is not present when the verdict is rendered, that is a fact extrinsic of the record, and may be shown on a motion to set aside the verdict for that reason."

In Rawlins v. Mitchell, 127 Ga. 24, after the overruling of a motion for a new trial, the affirmance of the judgment by the Supreme Court of Georgia, and an affirmance of the latter judgment by the Supreme Court of the United States, the defendant filed a motion to set aside the judgment on the ground that the record failed to show the presence of the defendant and his counsel at the

rendition of the verdict. The trial judge refused to sign the bill of exceptions, and the Supreme Court declined to issue a mandamus. But the ruling of both courts was based on the lack of substantial merit in the motion, and not upon the procedure, **which was impliedly approved.** Judge Cobb in rendering the opinion stated on page 27, without the slightest intimation of disapproval, that the case related to a ruling on a motion to set aside a judgment made after the term at which the judgment was rendered, but within three years from the date of the judgment. He also said, on the same page, that **no party will be deprived of a hearing on the merits of his case, no matter what may be its character, whether an extraordinary motion for a new trial, motion to set aside a judgment, or other proceeding after verdict.**

In making this statement through Judge Cobb, the Court had specifically in mind a previous motion for a new trial, as shown by its discussion of the difference in the right to mandamus when following original and extraordinary **motions for a new trial.**

In Hopkins v. State, 6 Ga. App. 403, the opinion recites the following facts:

"Before the adjournment of the court the defendant filed a motion for new trial, which was later abandoned, and also filed a motion for his discharge upon the ground that he had once been placed in jeopardy. The motion for discharge was set for a hearing upon a later date, and amendments offered were permitted, but upon final hearing the court declined to grant the order discharging the defendant.

"We think the prisoner was entitled to an absolute discharge. Our decision is controlled by the ruling in Nolan v. State, 55 Ga. 521 (21 Am. R. 281). It is clear that the verdict was a nullity, because, by the separation of the jury, the defendant was deprived of his right to poll the jury, if of no other right. Although the verdict

is a nullity for the reason that the dispersal of the jury must be deemed at least equivalent to a mistrial, yet inasmuch as this mistrial was occasioned without the consent of the defendants, and not caused by any such necessity as is recognized by law as being a sufficient ground for ordering a mistrial, the defendant can not again be placed upon trial for the same offense. See Barfield v. Mullino, 107 Ga. 730 (33 S. E. 647); Bagwell v. State, 129 Ga. 170 (58 S. E. 650)."

It appears from this excerpt that the Court of Appeals found nothing in the fact that a motion for a new trial had been previously filed and abandoned to militate against the granting of a discharge.

It will be noted that in the Nolan case, the motion to set aside the verdict was made after a motion in arrest of the judgment had been overruled, in the Rawlins case, after a motion for a new trial had been made and overruled, and in the Hopkins case after a motion for a new trial had been filed and afterwards abandoned. In none of these cases was there any intimation from the court that the prior unsuccessful effort affected in any way the right of the accused to move that the verdict be set aside.

In the following cases, an objection to the verdict and judgment on the ground that the accused was not present at the rendition of the verdict, or on analogous grounds, was presented by motion to set aside:

Nolan v. State, 53 Ga. 136.
Nolan v. State, 55 Ga. 521.
Smith v. State, 60 Ga. 430.
Barton v. State, 67 Ga. 653.
Cawthorn v. State, 119 Ga. 396.
Franks v. State, 120 Ga. 495.
Rawlins v. Mitchell, 127 Ga. 495.

Hopkins v. State, 6 Ga. App. 403.
Lyons v. State, 7 Ga. App. 50.
Ezzard v. State, 11 Ga. App. 30.

In Nolan v. State, supra, we have already referred to the practice pursued.

In Smith v. State, 60 Ga. 430, the Court said on page 434:

> "The authority most in point on the question before us is 53 Ga. 137. It rules that absence at the rendition of the verdict is a fact extrinsic of the record, and may be proved on a **motion to set aside the verdict**; and that the judgment will not be arrested because presence does not affirmatively appear, in express terms, on the face of the record. The ground of the decision is established practice believed to be uniform."

In Barton v. State, 67 Ga. 653, the Court said on page 654:

> "The defendant was out on bail, was absent when the verdict was rendered, but his counsel was present, and a motion was afterwards made **to set aside the verdict.** The refusal to grant this motion is the error assigned."

In Cawthorn v. State, 119 Ga. 396, the bill of exceptions was based directly upon the act of the court in receiving the verdict in the defendant's absence, and claimed that **the verdict should be held to be illegal and be set aside.**

In Franks v. State, 120 Ga. 495, Chief Justice Simmons in a headnote decision, said in part that the silence of the record as to the presence of the defendant at the reception of the verdict is no cause for arresting the judgment or setting it aside.

The case of Rawlins v. Mitchell, 127 Ga. 24, has already been referred to supra.

In Hopkins v. State, 6 Ga. App. 403, the procedure was a motion for new trial, which was later abandoned and a motion filed for his discharge upon the ground that he had once been placed in jeopardy.

In Lyons v. State, 7 Ga. App. 50, there was a full discussion beginning on page 52 by Judge Hill of the practice on this point, which discussion ends with the significant conclusion, as follows:

"The procedure adopted in this case (motion to set aside the verdict) is in accord with the trend of modern judicial utterance and legislative enactment to do away with all technical niceties of pleading and to present to the court clearly and simply, the issues involved in the case."

Judge Hill said:

"In support of his demurrer that the petition in this case was not a proper legal procedure, counsel for the State relies upon the decision of the Supreme Court in the case of Regopoulas v. State, 116 Ga. 596 (42 S. E. 1014). In that case the Supreme Court held that a motion to set aside a judgment, like a motion to arrest it, must be predicated on some defect apparent on the face of the record, the two differing only in respect to the time in which each must be made. The decision was by four Justices, and one of the four concurred in it because, as he stated, he was bound to do so by the early adjudications of the court. Nevertheless, the decision is binding upon this court as a precedent, until reviewed and reversed, whatever may be the opinion of this court as to its soundness. In the subsequent case of Ford v. Clark, 129 Ga. 292 (58 S. E. 818), Mr. Justice Evans calls attention to the fact that, notwithstanding the frequent decisions of the Supreme Court which hold that a mo-

tion to set aside a judgment must be based on some defect which appears on the face of the record, not all motions to set aside judgments are necessarily based on matter appearing on the face of the record. And he cites section 5366 of the Civil Code, which contains a clear recognition of the right to set aside a judgment on motion, for a defect not apparent on the face of the record; and in the very case of Ford v. Clark, supra, the Supreme Court unanimously approved of the motion to set aside and vacate a judgment founded on a verdict obtained by fraud practiced on the defendant. While an examination of the decisions of the Supreme Court disclose some conflict as to the proper procedure to be adopted to set aside a judgment rendered by a court of competent jurisdiction, for fraud and irregularity, it seems to have been uniformly held, as far back as the case of Mobley v. Mobley, 9 Ga. 247, that, to vacate a judgment procured by fraud, it was proper procedure to file a petition distinctly alleging the specific fraud, and praying a rule requiring that all the parties interested show cause why the judgment should not be set aside. When the rule was served, the court, on the day therein appointed, would proceed to hear evidence relating to the alleged fraud. See Turner v. Jordan, 67 Ga. 604; Union Compress Co. v. Leffler, 122 Ga. 640 (50 S. E. 483). In the latter case it was held, that "in a proper proceeding by petition, with rule nisi or process, and service upon the necessary parties, the courts of this State may exercise the jurisdiction, which obtained at common law, to set aside judgments for irregularities not appearing on the face of the record.

"This is not a motion to set aside a judgment; because there seems to have been no judgment rendered in the case. It is a petition to vacate and set aside a verdict, for an irregularity not appearing on the face of the record, on which a rule was issued and served; and it certainly constituted a proceeding in a court of law hav-

ing full jurisdiction of the subject-matter alleged in the petition. We know of no other full and adequate remedy for a party deprived of his right as alleged in this petition than the one adopted. The rendition of the verdict during his enforced absence, without a waiver by himself, deprived him of a constitutional right. **The error is hardly one that would be proper matter in a motion for a new trial; and if the defendant were compelled to resort to a motion for a new trial to correct such error, he would be prevented from asserting another great constitutional right—the right not to be again placed in jeopardy for the same offense.** Neither his counsel nor himself was present to object to the reception of the verdict. Certainly it could not be expected that he would be required to file a bill in equity, if such a thing could be done, to get rid of this verdict which had been improperly rendered in his absence. The procedure which he adopted was a direct and simple procedure for the assertion of his rights and for the application of the remedy for which he prayed. It was a remedy approved by Chief Justice Warner, speaking for the court, in the case of Nolan v. State, 53 Ga. 138, as follows: "It was the legal right of the defendant to be present when the verdict was rendered; and had a motion to set aside such verdict been made on the ground of his absence, it should have been granted." "If the defendant is not present when the verdict is rendered, that is a fact extrinsic of the record, and may be shown on a motion to set aside the verdict for that reason." "A verdict rendered during the compulsory absence of the defendant is illegal, and will be set aside on motion." Barton v. State, 67 Ga. 653 (44 Am. R. 743). The procedure adopted in this case is in accord with the trend of modern judicial utterance and legislative enactment to do away with all technical niceties of pleading and to present to the court, clearly and simply, the issues involved in the case."

In Ezzard v. State, 11 Ga. App. 30, the court stated the practice in the case as follows:

"The indictment was for fraudulently making and forging a deed to real estate, and uttering and publishing the deed as true, with fraudulent intent. The verdict was: "We, the jury, find the defendant guilty of uttering and publishing said deed. We further recommend to treat as a misdemeanor." Judgment of conviction was duly entered upon the verdict, and a misdemeanor sentence imposed. During the term a motion for a new trial was made. At a subsequent term, and while the motion for a new trial was pending, the accused filed a motion to set aside the judgment of conviction, upon the ground that the legal effect of the verdict was an acquittal. Both motions came on for a hearing at the same time, when a new trial was granted and the motion to set aside overruled. The latter judgment is brought to this court for review."

In its opinion, on page 32, the court said:

"Technically, the present motion to set aside, filed after the term, can not be maintained, because a motion in arrest, filed during the term, was the proper medium through which to search for error appearing on the face of the record. But the real purpose of the motion is to obtain judicial sanction for the contention that the verdict is a nullity. Where a judgment or verdict is absolutely void on its face, courts are not over-technical in reference to the means by which or the time when their attention is called to the infirmity. A defendant should never be deprived of his liberty under a verdict which in effect amounts to an acquittal. But we can reach the right result without in anywise disturbing rules of practice. We will affirm the judgment, but at the same time direct that when the remittur is filed in the trial court, a judgment be entered discharging the plaintiff in error from custody, upon the ground that the verdict rendered against him amounted to an acquittal of the crime

charged in the indictment, and that when entered, such a judgment shall operate as a bar to any further trial of the accused under that indictment. The exception in the bill of rights, that one accused of crime may be more than once tried for the same offence, when the verdict is set aside on his own motion, applies only where he has obtained a new trial 'after conviction.' Where he has been acquitted, he can not lawfully be again tried for the same offence, even on his own motion.''

It is stated by Judge Cobb in the case of Cawthorn v. State, 119 Ga. 395, that the weight of authority in other jurisdictions seems to be that counsel can not waive the right of the accused to be present. This is the rule prevailing throughout the United States without exception:

Rex. v. Streek, 2 Car. & P. 413, 12 E. C. L. 646.
Hopt v. People of Utah, 110 U. S. 574, 579.
Lewis v. U. S., 146 U. S. 370.
Fight v. State, 7 Ohio, Part 1, 180, 28 Am. Dec. 626.
Rose v. State, 20 Ohio 34.
Eliza v. State, 39 Ala. 694.
Waller v. State, 40 Ala. 325.
Cook v. State, 60 Ala. 39, 31 Am. Rep. 31.
Wells v. State, 147 Ala. 140, 41 So. 630.
Green v. People, 3 Colo. 68.
Smith v. People, 8 Colo. 457.
State v. Jenkins, 84 N. C. 812, 37 Am. Rep. 643.
State v. Kelly, 97 N. C. 404, 2 Am. St. Rep. 299.
State v. Cherry, 154 N. C. 624.
Prine v. Commonwealth, 18 Pa. St. 103.
Shipp v. State, 11 Tex. App. 46.
Hill v. State, 54 Tex. Crim. 646.
Sperry v. Commonwealth, 9 Leigh 623, 33 Am. Dec. 261.
Lawrence v. Commonwealth, 30 Gratt. (Pa.) 845.
Sherrod v. State, 93 Miss. 774, 47 So. 554, 20 L. R. A. N. S. 509.

State v. Davis, 66 Mo. 684, 27 Am. Rep. 387.
State v. Myrick, 38 Kan. 238, 16 Pac. 330.
Percer v. State, 118 Tenn. 765, 103 S. W. 780.

It is said by Judge Cobb in the Cawthorn case, supra, to be an open question in this state whether an attorney, by virtue of his mere relationship as such, has authority to waive the presence of his client at the reception of the verdict. But an examination of the cases cited demonstrate that throughout the United States it is recognized as an established principle that he has **no such authority, and that he cannot waive by virtue of his relationship the presence of his client at the reception of the verdict.** If this be the law it would seem, then, to be an inevitable conclusion that if the attorney cannot make such a waiver prior to the reception of the verdict, he cannot make it after the verdict. In other words, if he cannot, prior to the reception of the verdict, waive his client's presence by an oral or written statement, he cannot, on principle, do so after the verdict by filing a motion for a new trial. If he cannot make such waiver before verdict, he cannot by any act done after the verdict prevent himself or his client from making the point that the verdict was received in their absence. This is no more than saying that under a system of law professing to be based upon principle, one cannot do indirectly that which he is forbidden to do directly, nor can he do in a roundabout way that which he is forbidden to do openly. If, as we shall undertake to show, it is contrary to law and the most vital principles of public policy that an attorney should have the authority to waive his client's presence at the reception of the verdict, then he should not have the authority, by filing and urging a motion for a new trial, to cut his client off from the right of objecting that the verdict has been received in his absence. If counsel has no power to waive the right, he has no power to prevent his client from object-

ing to its violation. If it be said, that the act of the attorney in filing and urging a motion for a new trial must be taken to be the act of his client, the answer is this, that the kind of waiver on the part of the client evidently in the mind of the court, even in the Cawthon case, was a personal waiver with full understanding of its actual effect and practical consequences. The filing of a motion for a new trial is the act of the client only in a strictly technical sense. He can not know and is not supposed to know all the consequences of the act. He is compelled to rely on the advice and direction of his counsel, and the act is, in reality, the act of the attorney and of him alone. We submit, therefore, that the contention made in the 6th ground of the demurrer simply amounts to this: that while an attorney may not be able to waive his client's presence by a direct act, he may nevertheless do so by an indirect act and in a roundabout method. This, we submit, is untenable.

To further illustrate this point, we will refer the court to certain analogous cases decided by this court where certain attempted waivers have been held illegal and void and contrary to the provisions of §10 of the Code of 1910, providing that a person may waive and renounce what the law has established in his favor **only when he does not thereby injure others or affect the public interest.** Take the case of Watts v. Watts, 130 Ga. 683, where it was held that the defendant in an action for divorce could not by acknowledgment of service and agreement that the case be tried in the county of the residence of the plaintiff confer power upon the court to render a valid judgment. This ruling of the court was based on the principle that the public itself has an interest in the conducting of divorce proceedings according to law, and that the parties themselves could not by private arrangement do away with these regulations. Suppose, then, that in a divorce case where the defendant had undertaken by agreement with the plaintiff to confer

jurisdiction upon the court which it did not possess, a verdict, after a contest, had been rendered against the defendant. Could it be contended that because he had thereafter filed a motion for a new trial, attacking the verdict on the ground of the insufficiency of the evidence, he could not, after an adverse judgment on the motion, challenge the jurisdiction of the court and have the verdict and judgment set aside as being void for lack of jurisdiction?

Take another case. This court has held in the case of Central Railroad Bank v. Johnson, 56 Ga. 225, that the parties can not by agreement themselves waive the filing of pleadings, the same principle being afterwards stated in Hilt v. Young, 116 Ga. 708. Suppose then that in a case where such an agreement had been made and acted on, and after a verdict and judgment, the losing party had filed a motion for a new trial, objecting to the verdict on the ground only that it was contrary to the evidence. Would the filing and subsequent overruling of such a motion for a new trial estop him from thereafter attacking the verdict and judgment on the ground that there having been no pleadings, they were wholly illegal and void?

Take another case. This court in the case of Yeomans v. Williams, 117 Ga. 800, held that in lunacy proceedings the ten days' notice required to the three nearest adult relatives of the alleged lunatic could not be waived by them. Suppose that in a case where such a waiver had been attempted, and, after a contest a judgment declaring lunacy had been rendered, an appeal had been taken to the superior court. Could it be contended that the taking of this appeal would prevent the point being raised after a verdict of the superior court also declaring lunacy, that on account of the failure to give the ten days' notice, the whole proceedings and the judgment and the verdict was entirely void? We believe that there would be no hesitation in answering all these ques-

tions in the negative, and for the same reasons and on the same principles, we submit that there can be no question that the filing of the motion for a new trial in the case at bar did not and could not operate to estop the plaintiff in error from afterwards urging that the verdict and judgment, on account of his absence at the reception of the verdict, were utterly illegal and void.

If the law of this state refuses to tolerate the trial of a divorce case in any other than the prescribed jurisdiction; if it declares that a civil case cannot be conducted without written pleadings; if it insists that no judgment of lunacy can stand unless there be shown the required notification to the next of kin; if all these attempted acts and many other of no more serious consequence be utterly null and void, and incapable of subsequent ratification, it would certainly seem that an attempt to try a human being for his life in his absence would be equally so.

Our contention on this point is summed up in section 5964 of the Code of Georgia, reading as follows:

"The judgment of a court having no jurisdiction of the person and subject-matter, or void for any other cause, is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it."

The verdict finding the plaintiff in error guilty was not merely voidable. It was absolutely void. It was lacking in a vital and essential element, and was a nullity. No act of the accused or his counsel, prospective or retrospective, could heal or cover up its inherent and fundamental illegality.

The 5th ground of the general demurrer is as follows:

"Said motion should be denied because the same affirmatively discloses that counsel for said Leo M.

> Frank agreed with the Court that said defendant should not be present at the rendition of the verdict. This agreement on the part of counsel was and is binding on the said Leo M. Frank, and effectively constitutes a waiver."

We have already cited on page 59, preceding, the authorities denying this contention of the state. After what is believed to have been an exhaustive examination, it is asserted that there is no case extant holding that in a capital case an attorney has authority to waive the presence of the defendant at the rendition of the verdict.

The statement of Judge Cobb in the Cawthon case, admittedly an expression only of his personal opinion, marks the farthest point to which any American or British court has gone in that direction. It is in conflict with the unanimous voice of all the courts that have considered the question.

But the existence of such authority on the part of counsel is denied, not merely by a great multitude of decisions, but also by the most powerful and compelling reasons. The primary purpose of all judicial procedure, criminal as well as civil, is the ascertainment of truth. In criminal procedure, the universal experience of mankind throughout the ages has demonstrated that one of the surest safegards against error and the perpetration of injustice is the personal presence at the trial of the accused and his legal adviser. In fact, it may be said to be the greatest safeguard, for it is based upon the operation of the primary and unfailing instinct of self-preservation.

The test of whether an attorney should or should not have the authority to waive the presence of his client at the rendition of the verdict or at any other stage of the trial, is the question, does such authority on his part tend toward the ascertainment of truth and the attainment of justice? The question carries its own answer. Such

authority, in its very exercise, overthrows and destroys that which is the primary safeguard of truth and justice. It ought not, therefore, to be recognized or tolerated in any system of laws which seek to accomplish these ends.

Those who assert that an attorney should have this authority carry the burden of showing the possible existence of such exigencies in criminal trials as would justify the putting aside of these fundamental rules. They should point out the conditions which justify the court in conducting the trial in the absence of the accused and accepting the agreement of his counsel consenting to his absence. We assert that with the exception of the case where the defendant is out on bond and his absence from the trial is his own voluntary contempt of the court and his own wrong, there are no such conditions. We assert that, with the above exception, there never has arisen and that there cannot arise any circumstances in a criminal trial that could justify the court in proceeding in the absence of the accused. **We assert that an examination of the cases in which this question has arisen demonstrates that the absence of the accused was always the result of insufficient or discreditable reasons—either the mere personal convenience and comfort of judges or attorneys, or the effort of a terrorized court to protect itself from mobs which it feared to control.** The reports of the decisions of this court beginning in 1852 with the case of Wade v. State of Georgia, 12 Ga. 25, contain at least sixteen cases in which the court was called upon to consider questions growing out of the absence of the accused at one stage or another of the trial. We have examined these cases to determine what were the circumstances that led to such absence, and we give below the result of the inquiry.

In Wade v. State, 12 Ga. 25, a prosecution for assault with intent to rape, the jury was called from their room,

after they had retired, and certain parts of the testimony read to them in the defendant's absence. No explanation is found in the report of the facts as to why he was absent, and the inference is that it was due simply to the **neglect of the court.**

In Martin v. State, 51 Ga. 567, a prosecution for simple larceny, the jury was recharged in the absence of the defendant and of his counsel. Such absence was shown to be due solely to the desire of counsel to serve **their own convenience and of the neglect of the court.**

In Nolan v. State, 53 Ga. 137, a prosecution for murder, the verdict was received in the defendant's absence. His absence was due to a misunderstanding of an agreement of counsel looking to the **convenience of themselves and the court.**

In Bonner v. State, 67 Ga. 510, a prosecution for murder, the jury was recalled and recharged in the defendant's absence which was attributable to the **court's neglect.**

In Barton v. State, 67 Ga. 653, a prosecution for perjury, the defendant was **out on bond.** He made arrangements to be notified when the verdict was reached, but the messenger left the court house and went home previously.

In O'Bannon v. State, 76 Ga. 29, a prosecution for larceny from the house, the defendant was present, but his attorney was absent **for his own convenience.**

In Wilson v. State, 87 Ga. 583, a prosecution for murder, the defendant was in a room adjoining the court room in the custody of an officer while the jury was be-

ing recharged. The absence was due to the **judge's oversight and neglect.**

In Tiller v. State, 96 Ga. 430, a prosecution for murder, the defendant was absent during the argument of the solicitor, due to the **oversight or ignorance of the court.**

In Hobson v. State, 116 Ga. 90, a prosecution for selling liquor, the defendant and his counsel were absent during a second charge, the result of the **oversight or ignorance of the court.**

In Hill v. State, 118 Ga. 21, a prosecution for a misdemeanor, the defendant was **out on bond.**

In Cawthon v. State, 119 Ga. 396, a prosecution for murder, the defendant and his counsel were absent at the reception of the verdict. A waiver had been made in court in the personal presence of the accused, which waiver was stated to have been made in the **interest of the prisoner's safety and of the preservation of order.**

In Bagwell v. State, 129 Ga. 170, a prosecution for murder, a mistrial was declared in the absence of the defendant and his counsel, the jury being unable to agree. The defendant's absence was **attributable to the oversight of the judge.**

In Roberson v. State, 135 Ga. 654, a prosecution for murder, the court repeated instructions to the jury in the presence of the defendant, but in the absence of counsel, which absence was due to **his personal convenience.**

In Richards v. State, 136 Ga. 67, a prosecution for murder, the absence of counsel at the reception of the verdict was on account of **his own convenience.**

In Baldwin v. State, 138 Ga. 349, a prosecution for murder, the attorney was absent at the reception of the verdict without permission of the court on account of **his own convenience.**

In Lyons v. State, 7 Ga. App. 50, a prosecution for a misdemeanor, both defendant and counsel were absent at the reception of the verdict on account of the con**venience of counsel and the court.**

An examination of the reports of other courts reveals the same conditions. The experience of the Georgia courts is typical of all. It demonstrates unerringly and uniformly that the failure of the court to have the accused brought from his cell to the court room is always due to one of three causes, either a desire on the part of the judge or attorneys to serve their own comfort and convenience, or the ignorance, neglect or indifference of the court, or the intimidation of the court by a mob. It is submitted that none of these conditions palliate the delinquency of the court, much less justify the clothing of counsel with a power, the inevitable effect of which is the overthrow of a vital principle essential to the protection of human life and liberty. No such power has ever been recognized in Georgia; nor is it likely that it ever will be, unless the overawing and terrorizing of the trial courts by mobs and the yielding and surrender of these courts becomes so much a part of their regular procedure that the power will become necessary to facilitate business. There is no higher duty resting upon this state than to accord to the defendant in criminal prosecutions, under all conditions whatsoever, at whatever cost or peril, a fair and impartial trial. If it intends to discharge that duty, if it does not intend to surrender to mobs the authority of its courts, there is no need whatever that its attorneys be empowered to agree that crimi-

nal trials may be conducted, either wholly or partially, in the absence of the accused. Indeed, it is not easy to understand how any community regarding itself as civilized could tolerate the introduction into its laws of a practice legalizing a thing so abhorrent to every instinct of justice and decency as the trying of a human being for his life in his absence.

Up to this point, it has been assumed without question that the alleged "waiver" by the plaintiff in error's counsel of his presence at the rendition of the verdict was a waiver, both in fact and law, that would be recognized as such according to legal principles. That, however, is now denied. **There was nothing about the so-called "waiver" that entitled it to the name.** A true waiver is a form of agreement and, like all agreements, cannot be made unless there be **entire freedom of will** on the part of those undertaking to make it. An agreement extorted by **duress, or threat, or apprehension of violence to life or limb** is none. According to the allegations of this motion, the agreement of his counsel to waive his presence at the rendition of the verdict was induced by the statement of the presiding judge, himself, "primarily and above all others, responsible for the regularity and lawfulness of the trial," that in the event of a verdict of acquittal, the life of the defendant and of his counsel would be in peril. This was no waiver **AND THE LAW OF WAIVER DOES NOT ENTER INTO THE CASE.**

Massey v. State, 31 Tex. Crim. Rep. 371, 20 S. W. 758.

State v. Weldon, 91 S. C. 29, 74 S. E. 43, 39 L. R. A. N. S. 667.

Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29.

State v. Davis, 66 Mo. 684.

In Massey v. State, supra, an indictment of a negro for rape upon a white woman, the court said in part:

"Fifth assignment: Was appellant deprived of a

fair and impartial trial by the presence of the mob? To this it may be replied that he should have applied for a change of venue. Appellant's answer to this is that certain of the people of Grayson county had organized and agreed among themselves that, if a change of venue was granted to defendant in this cause, they would hang him before he left the courthouse; that the judge had full knowledge of all the acts and doings of the mob, and that, while it was surging around the jail, one of the defendant's attorneys, appointed by the court, applied in person to the court, and asked him, of his own motion, to change the venue, as the defendant could in no event obtain a fair trial in Grayson county; that the court refused to do so, for the reason "that it would at once precipitate an attack upon the jail, which he desired to avoid." Were these facts true? The appellant swears they were. He also swears that the judge who tried the case knew them all, and gave as a reason for not changing the venue that to do so would at once precipitate an attack upon the jail, which he desired to prevent. When the application for a new trial was presented to the judge, containing these matters, he knew they were true, or he knew that they were false. He, however, makes no denial or explanation whatever. We must therefore presume them to be true. **Such a state of affairs existing, if true, the court being environed and dominated by such a mob, breathing out such threats to the life of the appellant, it is solemn mockery to talk, think, or imagine a fair trial, under such conditions.** Appellant was not required to apply for a change of venue, when, if granted, his life would be forfeited—the price. To hold that a trial, under such circumstances, was fair, impartial, and legal, would be a travesty on decency, law, common sense,

and justice, notwithstanding good men may have tried appellant.

"**Appellant was not present when the verdict was reached and returned into court. But the state replies that he waived this right. He did; but under what circumstances was this so-called waiver made? 'While the jury were out, considering of their verdict, the honorable district judge who tried the case advised defendant's counsel to have defendant to waive his right to be present at the reading of the verdict, as under the circumstances it was best to have him safely in jail. The county attorney then wrote out a waiver, which defendant's attorney brought to the jail, and defendant signed it. Neither the honorable judge nor the county attorney denies these things, nor is there any explanation of this matter. Why was it best to have defendant safely in jail? What were the circumstances which rendered it best to have him safely in jail? The answer to these questions is evident. The spirit, if not the presence, of that same howling, threatening, tumultuous, blood-thirsty mob, had overawed justice, dominated the court, and thus deprived the appellant of the right to be present in court when the issue of his life or death was being settled. Did the appellant waive his right to be present when the jury returned their verdict? He did not. THIS SO-CALLED WAIVER WAS FORCED UPON HIM. He was compelled to make it, or take the risk of being hung by the mob in the event the jury failed to hang him. IT WOULD BE AN INSULT TO LAW, JUSTICE, AND COMMON SENSE TO SUBMIT AN ARGUMENT OR CITE AUTHORITIES TO PROVE THAT THE ACT OF APPELLANT, CALLED A 'WAIVER,' WAS NOT SUCH AS WOULD BE BINDING UPON HIM. Appellant had a right to a fair and impartial trial, which was de-

nied him by a mob. He had a right to be present in court. It was his court, the court of every citizen of this state. Its portals must be kept open, and no mob has a right to close them against a citizen who **is being tried for his life, liberty, or property.** He was deprived of this right by a mob, and not by the court; for the writer is impressed by this record with the belief that the ruling of the court in regard to the change of venue and motion for a new trial was made to save defendant from the vengeance of the mob. But is contended that the mob, when the verdict was returned had dispersed; that in fact there was no danger to appellant. **THE HONORABLE JUDGE DID NOT SO VIEW THE SITUATION, OR HE WOULD NOT HAVE REQUESTED THE WAIVER.** The sheriff did not think so, or he would not have been removed from the Grayson county jail. But it may be contended that the appellant, notwithstanding all these facts, had a fair trial. See Craiger, Andrews, and Dickerman affidavits, that the jury was composed of the very best men, and, so far as Dickerman knows, passed upon the case in a proper spirit, without being influenced by extraneous and improper matter. No one denies that the mob was present; that its members agreed among themselves that if a change of venue or continuance was had, or if appellant was acquitted or was not hung by the verdict of the jury, they would at once hang him. **Nor is it denied that the judge requested the waiver because he thought, under the circumstances it would be best to have the appellant safely in jail.** Must appellant, under such state of facts, go with his evidence into the jury room, and show that the jury was influenced by the mob, or will the state be permitted to show by jurymen that they were not so influenced? If so, our statutes on the subject of changing venue are nonsense—sheer

foolishness. We cannot prove its effect by positive evidence. Its spirit pervades the surrounding atmosphere, and dominates the court and jury without their knowledge."

"Appellant has not had a fair and impartial trial. He has not had a legal trial. But it may be urged that he is guilty, beyond all question and therefore the judgment should be affirmed. Not so. The accused must be tried and convicted legally, and, though he be a negro, he must be tried in precisely the same manner as if he were a white man. And we cannot strain the law, even in the estimate of a hair, because appellant is a negro, or because of any unusual features of the case. In all civilized countries the law has always shown the most sacred regard for human life, and judicial tribunals, in the administration of the criminal law, have always deemed it proper to adhere with great strictness to established rules, where life and liberty are concerned. If courts could feel themselves at liberty to depart from principle or established rules in order to hasten the punishment of even great offenders, such departures might result in the destruction of those safeguards which, in accordance with the genius of all free governments, have been provided for the life and liberty of men. Calvin v. State, 25 Tex. 789.

In State v. Weldon, supra, the Court said:

"The special judge, Hon. George W. Brown, who presided at the trial has certified that, according to the facts as they appeared to him, the rights of the defendant were safeguarded and the trial properly conducted. His opinion and that of Judge Prince, who denied the motion for a new trial, are entitled to great consideration, for their ability and their solicitude that the defendants should have a fair trial cannot be doubted. In passing upon the cor-

rectness of their conclusions of law, every statement of fact made by the trial judge will be taken as true; and the evidence afforded on behalf of the defendants will be taken as true only in so far as it is consistent with the statement of fact found in the report of the trial judge.

"Looking at the case in this way, we find these to be the material facts: An atrocious murder of a worthy citizen had properly aroused the interest and indignation of the entire community. One of the persons suspected had confessed, and implicated as active participants in the crime the two defendants. Very soon after the murder, a special term of court had been ordered to try both the confessed murderer and these defendants. An immense number of people assembled at the trial intensely hostile to the accused, and crowded the courthouse. The defendants being without counsel, the presiding judge sent for Mr. W. F. Clayton and requested him to undertake their defense. On his way to the court through the dense crowd, Mr. Clayton 'heard expression in regard to lynching' which convinced him that, if he should ask for the three days of preparation allowed by law, the prisoners would be lynched, and under the compulsion of this fear he gave up that most vital right, and went immediately into the trial without preparation. That the danger of mob violence was present and imminent is made further manifest by the statements of Mr. Lucien W. McLemore and the stenographer of the court, Mr. F. F. Covington, both witness of high character. Not a particle of evidence was offered by the state to controvert this showing. The presiding judge, it is true, says that the crowd was quiet, and that it manifested no mob spirit to his eye nor in his hearing; but this statement does not impair the force of the testimony of those who mingled with the people, and thus had

better opportunity to observe. Thus it appears, beyond all doubt, that the circumstances of the trial were such that counsel of experience and courage **gave up, under the most urgent compulsion, the right to three days' preparation guaranteed to the accused by the law; and that, too, when he had been called into the case by the court without previous notice. COMPULSION IS SUFFICIENT TO ANNUL A WILL OR A CONTRACT FOR THE SALE OF PROPERTY. HOW, THEN, CAN IT BE HELD THAT A TRIAL INVOLVING LIFE OR DEATH WAS FAIR AND IMPARTIAL, ACCORDING TO THE LAW OF THE LAND, WHEN THE ACCUSED, UNDER THE COMPULSION OF A REASONABLE APPREHENSION OF LAWLESS VIOLENCE, SURRENDERS A RIGHT VITAL TO HIS DEFENSE?**

"In an opinion delivered by the distinguished Judge Elliott, the Supreme Court of Indiana, under circumstances very similar to those appearing here, set aside for **compulsion a plea of guilty, which defendant's counsel showed to the court had been entered, by their advice, on the reasonable apprehension that if their client should be acquitted he would be lynched.** Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29.

"It is argued, however, that counsel should have sought the protection of the court. No doubt, that course would have been the most judicious; but, in view of the surroundings, and especially in view of the fact that the judge's seat was itself pressed upon by the crowd, it would be an unjust judgment to hold that the accused lost a vital right by the failure of their counsel to do the most judicious thing in the sudden emergency which he was called on by the court to meet.

"Consideration of the further proceedings

deepens the conviction that the trial was not fair. With respect to the charge that the space within the bar immediately around the judge, the jury, and the witnesses was so taken by the great crowd that the trial could not proceed with decorum and fairness, the presiding judge says that it was the best behaved crowd he ever saw, and that there was nothing to indicate to him a sign of a riotous spirit; that it did crowd within the bar, but that it was not in possession of the courthouse. He says further: 'In every instance when I observed that it was becoming too much crowded within the bar, or my attention was called to such conditions, my admonitions received the most respectful consideration and obedience, and there was never any crowding within the bar that in any way interfered with the orderly dispatch of the business of the court, or with the rights of the counsel of the accused.' The affidavit of Mr. Clayton contains the following statement: 'That during the trial of the case deponent did not see the jury until he addressed them from the crowd intervening; that on several occasions deponent requested the judge to compel the sheriff to clear away the crowd that he might see the witness whom he was examining.' There is no statement of fact made by the presiding judge inconsistent with the statement of Mr. Clayton. It thus appears that a large number of persons hostile to defendants were allowed to so press upon the court that counsel for the defense had to ask several times that they be cleared away, so that he could see the witness under examination, and to so press around the jury that counsel could not see them until he stood before them to argue the case. We are unable to assent to the opinion of the presiding judge that such a state of affairs did not interfere with the orderly conduct of the business of the court, or with the

rights of the accused. Trials must be public; but the right of the accused to a fair trial is superior to the right of the public to witness the trial. In all trials, not only the dignity and decorum which should characterize the administration of justice, but the preservation of the rights of the people and of the parties to the cause, require that the public should be kept away from the witnesses and the jury and the counsel, to the end that the issue may be tried and decided without interference or extraneous influence. In this case, the public was not so kept away. On the contrary, a large number of persons justly indignant at an atrocious murder, and undeniably hostile to the accused, pressed upon the court, the jury, and the witnesses.

"Clearing away the hostile crowd from time to time did not meet the case. Fairness required that at least the space between the accused and their counsel, the jury, and the witnesses should have been kept free from intrusion. Courts cannot control public sentiment; but their commission from the people is to keep the inviolable precincts of the prisoner's dock, the counsel's place, the witness chair, the jury's seats, and the intervening space free from either hostile or friendly invasion or intrusion, lest the accused be terrified or his counsel confused in making his defense, lest the witness testify falsely under fear of inducement, lest the jury be overawed, or their minds influenced by an atmosphere surcharged with hostility or partiality. The intrusion into these inviolable precincts of a large number of persons, part of a vast assemblage hostile to the prisoners, was calculated to terrify the defendants, to confuse their counsel, to intimidate the witnesses, and to overawe the jury. **This, with the fact that counsel gave up the right of the accused to have three days to prepare for their trial**

under **THE COMPULSION OF A REASONABLE APPREHENSION** that the assertion of the right would result in their death by lynching, compels the conclusion that the defendants did not have a fair and impartial trial.

"Applying the law more specifically, we reach these conclusions: The conditions under which counsel conducted the defendants' cause, and under which their witnesses were examined, substantially interfered with the due exercise of the right granted by section 49 of the Criminal Code 1902, "that the accused shall, at his trial, be allowed to be heard by counsel, may defend himself, and shall have a right to produce witnesses and proofs in his favor, and to meet the witnesses produced against him face to face."

"The jury was not so safeguarded against extraneous influences as to allow the defendants the right of trial by an impartial jury, guaranteed by section 18, art. 1, of the Constitution; **and the defendants were, by the COMPULSION OF THE FEAR OF DEATH by lynching, deprived of the right to have three days to prepare for their trial, conferred on them by section 40 of the Criminal Code.**

"Under varying facts, other courts have, with practical unanimity, held that verdicts should not be allowed to stand, where action by those in attendance on a trial was calculated to overawe or influence the jury or SUBSTANTIALLY INTERFERE WITH THE VITAL RIGHTS OF THE PARTIES. Hamilton v. State, 36 Tex. Cr. R. 372, 37 S. W. 431; Woolfolk v. State, 81 Ga. 551, 8 S. E. 724; Raines v. State, 81 Miss. 489, 33 South. 19; Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29; People v. McMahon, 244 Ill. 45, 91 N. E. 104; Doyle v. Commonwealth, 100 Va. 808, 40 S. E. 925; State v. Wilcox, 131 N. C. 707, 42 S. E. 536; Robinson v. State, 6 Ga. App. 696, 65 S. E. 792.

"The judgment of this court is that the judgment of the Circuit Court be reversed, and the cause remanded for a new trial."

While more disorder apparently existed in the court-room in this case than in the Frank case, the compulsion on the mind of the court was greater in the latter than in the former.

In Sanders v. State, supra, the court said in part:

"This is an extraordinary case. The facts proved, the procedure adopted, and the relief sought are strange and unusual.

"The facts stated and proved are these: In April, 1878, Josephine Sanders, the wife of the appellant, was slain by a pistol shot, at the time she was in the room alone with her husband, and he did not and could not give any account of her death; he was then, and had been for many years, addicted to the use of alcoholic liquor and opium to such an extent that he had probably become insane; he was arrested shortly after the death of his wife; his case came on for trial; his counsel and many witnesses of unquestioned veracity testified that at the time of his trial he was insane; the homicide had aroused an intense feeling in the vicinity of the county-seat, where the killing was done, and the case put to trial, threats were made of lynching by a mob; counsel prepared an affidavit for delay, but feared to present it lest the mob should sieze and hang the accused; the sheriff of the adjoining county came to the county-seat of Clay county and warned the sheriff of that county of imminent danger from an armed mob; a jury had been impanelled and a plea of not guilty entered, but so great was the threatened danger, that counsel, to save, as they believed, their client's life, withdrew the plea of not guilty, entered a plea of

guilty, on which, without evidence, the jury returned a verdict of guilty, and a life sentence was immediately pronounced upon the verdict of the court; the accused was at once hurried to the train and conveyed to the State's prison. For the purpose of clearly exhibiting the situation at the time of the plea of guilty was entered, we quote from the testimony of the gentlemen who were then appellant's counsel, and who are men of high character and undoubted integrity. One of them says: As one of his counsel I urged and demanded of him a plea of guilty, with which I pledged myself to save his life; his counsel all concurred; Sanders always denying any knowledge of the homicide; his counsel were responsible for the act of pleading guilty, believing at the time that it was the only course by which his life might be saved." Another one of the counsel says that "the accused was bewildered and refused, but finally seemed to consent, and at last appeared to acquiesce in letting counsel take their own course; that the court was agitated and alarmed, and recommended and advised the plea of guilty. The turnkey of the jail, the sheriff of Clay and the sheriff of the adjoining county concur in stating that there was great and imminent danger of mob violence; one of the jurors says that there was intense excitement among the large crowd of people present at the trial; that he was himself stationed at the door of the court-house to signal to the jail any movement of the mob; that the judge was greatly excited, and said in the evening that he had not drawn an easy breath until he had seen the train in motion with Sanders aboard. There was other evidence as to the presence of a large number of angry and excited men, and it is also shown that they uttered threats of violence and appeared determined to seize and

hang the appellant unless punishment was at once imposed upon him.

"The relief prayed is that the judgment entered upon the plea of guilty may be vacated and the appellant put upon his trial in due form of law.

"There were strong reasons in support of the appellant's prayer. **All men are by our laws entitled to a fair trial, in absolute freedom from restraint and entire liberty from fear of threats and violence. It is almost mockery to call that a trial, or a judicial hearing, which condemns an accused upon a plea of guilty forced from his reluctant counsel by threats of an angry and excited mob, and interposed because they believed that to proceed with a trial upon a plea of not guilty would result in the hanging of their client by lawless men. A man who makes a PROMISORY NOTE because of fear is entitled to relief. A man who executes a DEED under duress is entitled to judicial assistance. A WILL executed under the influence of fear falls before the law. These are small things when compared with life and liberty, and yet in the eyes of the law they are null. IF SUCH THINGS ARE NULL WHEN PROCURED BY FEAR, OR EXTORTED BY VIOLENCE, SHOULD NOT A PLEA BE SO, WHEN TO HAVE REFUSED IT WOULD HAVE BEEN TO PUT IN JEOPARDY THE LIFE OF THE MAN ARRAIGNED UPON A CHARGE OF FELONY?** In many respects the facts of this case go far beyond that of ordinary cases of duress, for here the officers of the law, judge, sheriffs and jailers were inspired with fear of violence; counsel of age and experience, influenced by the appearances of danger which surrounded their client, **secured from him a reluctant acquiescence to the plea of guilty.** More than this, the accused, if not at the time absolutely insane and incapable of understanding what he did, was weak and enfeebled in mind,

and as his counsel expresses it, "lost and bewildered."

In State v. Davis, 66 Mo., 684, the headnote was as follows:

"A prisoner on trial for a criminal offense cannot consent to a proposal from the prosecuting attorney to go to trial with less than a full panel of jurors. Morally he is in chains; his action is involuntary and cannot constitute a waiver of his legal right to a full panel."

In the body of the opinion, the court said on page 686:

"**The very term waiver imports a VOLUNTARY ACT, and an act cannot be thus denominated when performed UNDER CONDITIONS OF PRACTICAL COMPULSION.** If the accused fails to object to an improper proposal coming from the representative of the State, he thereby loses a right guaranteed to him by the law. If he objects he thereby jeopardizes his right to an impartial trial by jury, guaranteed to him by the constitution. Under such circumstances, to hold the prisoner bound by an involuntary, so-called, and extorted consent, would be purely farcial, and the merest mockery of justice."

The seventh and eighth grounds of the demurrer are as follows:

"7. Said motion should be dismissed because it affirmatively appears from the same that the jury rendering the verdict in question were polled, and the presence of the defendant is necessary for himself mainly in order to exercise his right to poll the jury.

"The presence of said Defendant Frank in the Court room could not have secured or obtained for him any right whatsoever beyond the mere matter

of polling the jury, which this petition affirmatively discloses on its face was done."

"8. Said motion should be dismissed because this petition and the decision of the Supreme Court of Georgia in the case of Frank against the State affirmatively discloses that the verdict of guilty was received in open Court and a poll of the jury demanded on behalf of this defendant, and that said poll of said jury was in conformity with every requirement of law."

This contention of the State is narrow and wholly misconceives the great, beneficient purpose of the rule requiring the presence of the accused. The slightest examination of the authorities furnishes an overwhelming answer. It also misconceives the nature of polling itself, which is not merely the **questioning** of each juror whether the verdict returned is his verdict, but also the avowal by each juror that the verdict is his **in the presence of the accused.** The so-called polling in this case was lacking in its most vital and essential requisite. In fact and in law, there was no polling. Moreover, the contention, considered as an argument, begs the question. The issue is, has the accused in a capital case an absolute right to be present at every stage of the trial. If he has, then it is immaterial whether a denial of the right results in what the state may regard as an actual injury or not. It is the denial of the right that constitutes the injury. In the case of Hopson v. State, 116 Ga. 90, the Court speaking through Mr. Presiding Justice Samuel Lumpkin said:

"The great point is that the accused and his counsel have the **right** to be present at every stage of the proceedings and personally see and know what is being done in the case. To say that no injury results when it appears that what occurred in their absence was regular and legal would, in effect, practically do away with this great and important right, one

element of which is to see to it that what does take place is in accord with law and good practice."

DECISIONS OF THE FEDERAL AND STATE COURTS REVIEWED.

After a thorough and, what is believed to be, an exhaustive examination of the authorities upon the subject of the right of the defendant in criminal cases to be present at the trial and the rendition of the verdict, the following is given as a correct statement of the law:

First. In trials for capital felonies, the accused has an absolute right to be present in person at each and every stage. Such presence is essential to the validity of a verdict of guilty.

Second. In trials for capital felonies, both the accused and his counsel are incapable, on grounds of public policy, of waiving the presence of the accused at any stage of the trial.

Third. The only exception to the rule stated in the preceding paragraph is where the accused has been released on bail and has voluntarily absented himself from the trial. This exception is based upon the grounds, first, that the absence of the accused under such conditions is a voluntary contempt of the court and his own wrong, from which he can be permitted to take no advantage, and, secondly, that, unless such exception be recognized, it would be necessary to abolish the privilege of bail.

Fourth. The proposition is settled in Georgia by the case of Wilson v. State, 87 Ga. 583, a unanimous decision made in 1891, that in a capital case the defendant cannot waive his right to be present at any stage of the trial,

and that he must be present at every stage. In that case, the court recharged the jury without notifying the defendant and in his absence, although his counsel was present.

Fifth. The case of Cawthorn v. State, 119 Ga. 396, is the only case extant in American or British law holding that the accused in a trial for a capital felony may waive his presence. That case, however, is not binding authority in the present case for the following reasons: first, the court was divided, two of the judges dissenting on the ground that, on account of the form of the bill of exceptions, the case was not properly before the court and that it had no jurisdiction to pass upon the merits; secondly, because the case was reversed and sent back for a new trial on another ground, an error in the admission of evidence, and the ruling on the question of waiver was unnecessary to the decision; and, thirdly, that decision, even if it be authority, dealt with a case of **actual personal** waiver, the attorney making the waiver in court in the presence of the accused without objections from him, and, in that respect differs widely from the instant case where the state through its demurrer claims only a sort of ex post facto, **constructive** waiver by the filing of a motion for a new trial.

Finally, the case is in sharp conflict with an older and unanimous decision of this court in Wilson v. State, 87 Ga. 583. That was a prosecution for murder. The judge recharged the jury in the absence of the accused. The Court, speaking through Chief Justice Bleckley, said:

> **"Whether his absence from the room was VOLUNTARY or by compulsion, we think the court should not have recharged the jury in his absence.. He was in the custody of an officer, and whether the officer took him to the adjoining room WITH or without his consent, it seems to us, makes no difference."**

The foregoing case has never been overruled, doubted or questioned in any way, and is controlling authority.

The above quotation from the decision is a clear cut ruling that in a capital case the defendant himself has no power and is incapable of making any waiver of his personal presence at any stage of the trial.

Fifth. There is no case extant in American or British law holding that the absence of the accused in a trial for a capital offense can be waived **constructively, ex post facto.** Indeed, no case has been found in which such a contention was presented, much less prevailed.

The authorities sustaining the propositions above stated have been collated and are presented according to states, beginning with this State.

GEORGIA.

In Georgia, the presence of the accused at all stages has been held to be essential to the validity of the trial. The following stages of the trial have been specifically dealt with:

1. **At his arraignment, or waiver thereof:**
   Wells v. Terrell, 121 Ga. 368.
2. **At the declaration of a mistrial.**
   Bagwell v. State, 129 Ga. 170.
3. **At the argument of the Solicitor-general:**
   Tiller v. State, 96 Ga. 430.
4. **At the reading over by the court of the written testimony taken down by it to the jury:**
   Wade v. State, 12 Ga. 25.
5. **At the charge of the court:**
   Hopson v. State, 116 Ga. 90.
6. **At a recharge:**
   Martin v. State, 51 Ga. 567.
   Bonner v. State, 67 Ga. 510.
   Wilson v. State, 87 Ga. 583.
7. **At the rendition of the verdict:**

Nolan v. State, 53 Ga. 137.
Barton v. State, 67 Ga. 653.

Excerpts from the above decisions are given below in the order cited.

In Wells v. Terrell, Governor, 121 Ga. 368, the Court speaking unanimously through Mr. Justice Lamar, said: in the 3rd headnote:

> "It is universally held that a defendant in a felony case cannot be arraigned or plead in his absence."

In Bagwell v. State, 129 Ga. 170, the first headnote of a unanimous decision was:

> "In a prosecution for a felony the accused has the right to be present at every stage of the trial; and where the court in such a case, without the consent of the accused and during his enforced absence—he being confined in jail—ordered a mistrial because of the inability of the jury to agree, on a subsequent trial of the same case it was error, requiring a reversal, to strike a plea setting up such unauthorized mistrial and the former jeopardy of the accused."

In Tiller v. State, 96 Ga. 430, a trial of an indictment for murder, the solicitor general was permitted through the inadvertance of the court to make his argument to the jury during the absence of the accused. Speaking for a unanimous court, Mr. Justice Samuel Lumpkin, said:

> "**The rule that one on trial for a criminal offense is entitled to be personally present at every stage of the proceedings, is too well settled to require argument or the citation of authority. This rule, both in England and in this country, is so well recognized by the standard text-writers and by judicial decisions in an almost unbroken line of cases, that its existence**

cannot now be seriously called into question. It cannot be doubted that the argument of counsel is a stage of the proceedings, for the trial is not concluded until after the verdict has been received and recorded. The importance of this particular stage as affecting the accused is obvious, it being a matter of vital concern to him to see and hear everything done and said both for and against him as the trial progresses. When the accused is on bail, and therefore in control of his own movements, he may, by voluntarily absenting himself from the court-room, be deemed to have waived his right to make any objection to the validity of the trial because of his absence. In the case of Commonwealth v. McCarthy, recently decided by the Supreme Court of Massachusetts, 40 N. E. Rep. 766, it was held that when a person on trial for felony, who was on bail, voluntarily absented himself without leave when the jury retired to consider the case, and remained absent, the verdict rendered in his absence was binding upon him. But Knowlton, J., who delivered the opinion of the court, distinctly stated the general rule we have above announced, and in support thereof cited numerous authorities, which, as already intimated, might be multiplied indefinitely. **The case is altogether different when the accused has not been admitted to bail, but is confined in jail, and therefore in the strictest sense a prisoner whose movements are absolutely controlled by the court.** In the case with which we are now dealing, the accused was such a prisoner. Assuming his right to be present while the solicitor-general was arguing the case to the jury, and the accused being then absent, though the presiding judge was not actually aware of the fact, the real question is: Did the failure of counsel for the accused to call the attention of the court to the fact that the accused was not present constitute

a binding waiver by or for him of his undoubted right to be present?''

''It does not appear from the record that the counsel knew of the prisoner's absence; but granting that he had such knowledge, or is chargeable with it, could his mere silence be held sufficient to constitute such a waiver? We think not. In the case of **Bonner v. State,** 67 Ga. 510, this court held that in view of the right of the prisoner in a criminal case to be present in person throughout the trial, it was error for the judge to recharge the jury while the prisoner was absent and in confinement, although his counsel were present and kept silent. This case is, in principle, directly applicable to the case at bar, because the argument to the jury was a matter of great importance, and of almost, if not altogether, as much concern to the accused as the charge of the court. We therefore are of the opinion that it was a duty devolving upon the judge himself to see to it that the accused was brought from jail to the court-room before allowing the argument to proceed; and the omission to perform this duty is of sufficient gravity to require the granting of a new trial. We do not mean to say that the duty of seeing that his client was present did not also rest upon the counsel; but his failure in this respect should not relieve the judge of giving the proper attention to this matter, **he being primarily, and above all others, responsible for the regularity and lawfulness of the trial.**''

In the case of Wade v. State, 12 Ga. 25, Judge Warner said:

''Another ground taken for a new trial, is that the Court erred in calling the Jury from their room after they had retired to consider their verdict, into the Court room, and reading over to them the written testimony as taken down by the Court, without the

consent of the prisoner's counsel, and while **the prisoner was absent.'**

"This was clearly error. The Court has no more authority under the law, to read over the testimony to the Jury, affecting the life or liberty of the defendant in **his absence,** than it has to examine the witnesses in relation thereto, in his absence. The defendant has not only the right to be confronted with his witnesses, but he has also the right to be **present,** and see and hear, **all the proceedings** which are had against him on the trial before the Court. It is said the presumption must be, that the Court read over the testimony correctly, and read over all that was delivered against the defendant; therefore, he was not injured. The answer is, that it was the **legal right** and **privilege of the defendant,** to have been **present in Court** when this proceeding was had before the Jury in relation to the testimony delivered against him; and he is to be considered as standing upon **all his legal rights,** waiving none of them."

In Hopson v. State, 116 Ga. 90, the Court, speaking through Mr. Presiding Justice Samuel Lumpkin, said:

"We are, however, constrained to order a new trial upon another ground of the motion, which complains that, after the court had charged the jury and they had considered the case for some hours, the judge, in the absence of the accused and his counsel, and without any effort to bring them into court, gave to the jury a second charge which was substantially the same as that which had been given before they retired in the first instance. This practice can not be upheld. See Wade v. State, 12 Ga. 25; Martin v. State, 51 Ga. 567, Bonner v. State, 67 Ga. 510; Wilson v. State, 87 Ga. 583; Tiller v. State, 96 Ga. 430. There was no waiver of the right of the accused and his counsel to be present when the second charge was given. It does not appear that both were ig-

norant of its being given until after the trial had ended; but this makes no difference. It is an inevitable conclusion from the cases cited above that the accused may complain of such an irregularity after verdict, notwithstanding knowledge thereof by him or his counsel while the trial was in progress. Nor does the fact that the 'recharge' was, in substance, the same as the original charge dispense with the necessity for ordering a new trial. **The great point is that the accused and his counsel have the right to be present at every stage of the proceedings and personally see and know what is being done in the case. To say that no injury results when it appears that what occurred in their absence was regular and legal would, in effect, practically do away with this great and important right, one element of which is to see to it that what does take place is in accord with law and good practice.''**

In Martin v. State, 51 Ga. 567, the Court, speaking through Judge Trippe, said:

> ''It is true the court required the prisoner's counsel to strike from his motion for a new trial the ground that the jury were called back after they had retired, and were again charged by the court in the absence of defendant's counsel. But it still appears from the record that this was the fact, and the reason assigned for striking this ground was that the court understood the solicitor general to say, to-wit: that counsel for defendant had waived everything. Counsel for defendant denied this, and stated what he did waive, which was ''the polling of the jury and the reception of the verdict in his absence.'' There was then a misunderstanding between the counsel for the state and the defendant. Should that mistake or disagreement cause the forfeiture or loss to the defendant of his right to the benefit of counsel during

one of the most important portions of his trial, the charge of the court to the jury? The constitutional guaranty that "every person charged with an offense against the law shall have the privilege and benefit of counsel," should be strictly guarded and preserved. So deeply grafted in our practice has this great right become that none are so low or so poor but that they may rely upon it. If it be so that they are unable to retain counsel, the courts will appoint counsel for them, without charge to the defendant. The same duties and responsibilities rest upon counsel thus appointed as if they received the fullest pecuniary compensation. Nor does the fact that a defendant is thus represented lessen his right to have his counsel present at all stages of his trial."

In Bonner v. State, 67 Ga. 510, the court, speaking through Chief Justice Jackson, said:

> "Without scanning this entire record, we are of the opinion that a new trial must be granted, on the ground that the court erred in recalling the jury and recharging them at their request, in the absence of the defendant, who was at the time in custody and confinement, though his counsel were present, but silent.
>
> "The presence of the prisoner is necessary to his legal trial from the beginning to the end of that trial before the jury. 12 Ga. 25. And such was the rule and practice at common law. Wharton's Crim. Plead. and Prac. 540a, 545, 546, 549, 550."

In the case of Wilson v. State, 87 Ga. 583, Chief Justice Bleckley said:

> "The sixth ground of the motion for a new trial complains that the court recharged the jury without notifying defendant and in his absence, although

his counsel was present. It appears from the record that the judge did not know whether the accused was present in the court-room or not when the recharge was delivered, and that the fact was that he was in an adjoining room in the custody of an officer, not knowing that the jury was being recharged, and knowledge did not come to him until after the recharge was concluded. **Whether his absence from the room WAS VOLUNTARY or by compulsion, we think the court should not have recharged the jury in his absence. He was in the custody of an officer, and whether the officer took him to the adjoining room WITH OR WITHOUT HIS CONSENT, it seems to us, made no difference.** There is nothing to indicate that it was his intention to be absent when any material step was to be taken in the trial; and before taking such a material step as recharging the jury, we are of opinion that the court should have seen and known that he was present, verifying the fact, if necessary, by ocular demonstration. The presence of the counsel was no substitute for that of the man on trial. Both should have been present. Bonner v. State, 67 Ga. 510; Wade v. State, 12 Ga. 25; Martin v. State, 51 Ga. 567.

"There was error in not granting a new trial on this ground of the motion."

In Barton v. State, 67 Ga. 653, the Court, speaking through Chief Justice Jackson, said:

"It is the right of the defendant in cases of felony, and this is one, to be present at all stages of the trial—especially at the rendition of the verdict, and if he be in such custody and confinement by the court as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the

setting it aside on a motion therefor. Nolan v. State, 53 Ga. 137; 55 Ib. 521."

"The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into the court by its order."

In Nolan v. State, 53 Ga. 137, the Court, speaking through Chief Justice Warner, said:

"That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made to set aside the verdict on the ground of his absence, that motion should have been granted by the court."

UNITED STATES.

Hopt v. People, 110 U. S. 574, 28 L. Ed. 262.
Ball v. U. S., 140 U. S. 118, 35 L. ed. 377.
Schwab v. Berggren, 143 U. S. 442, 36 L. ed. 218.
Lewis v. U. S., 146 U. S. 370, 36 L. ed. 1011.

In **Hopt v. People, supra,** the opinion written by Mr. Justice Harlan, speaking for a unanimous court, was in part as follows:

"But it is said that the right of the accused to be present before the triers was waived by his failure to object to their retirement from the court-room, or to their trial of the several challenges in his absence.

"We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of

the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, "Cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority." I Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. **That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods.** The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the Legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. **If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.**

"For these reasons we are of the opinion that it was error, which vitiated the verdict and judgment, to permit the trial of the challenges to take place in the absence of the accused."

In **Ball v. U. S., supra,** the 8th and 9th headnotes as given in the Lawyers' Edition were:

"In capital felonies it must appear of record that

defendant was asked before sentence if he had anything to say why it should not be pronounced."

"A prisoner must be present when sentenced for felony; and this must appear by the record."

In **Lewis v. U. S., supra,** the Court said:

"A leading principle that pervades the entire law of criminal is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has at times, and in the cases of misdemeanors, been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."

The point made was that the accused had been required to challenge the jury from a list and without an opportunity of first meeting and seeing them face to face.

The Court further said:

"Thus reading the record and holding as we do that making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error for which the judgment of the court must be reversed."

ALABAMA.

State v. Hughes, 2 Ala. 102.
Eliza v. State, 39 Ala. 693.
Waller v. State, 40 Ala. 332.
Slocovitch v. State, 46 Ala. 227.
Cook v. State, 60 Ala. 39, 41, 31 Am. Rep. 31.
Wells v. State, 147 Ala. 140, 41 S. W. 630.
Harris v. State, 153 Ala. 19.

In **State v. Hughes, 2 Ala. 102,** the trial of an indictment for murder, the court said in the 1 and 2 headnotes:

"The 10 sec. of the 1 Art. of the Constitution guaranties to one indicted for a crime, the right to be present in Court, that he may discuss questions of law and fact, which may arise either preparatory to, or pending the trial, and that he may point out objections to the action of the jury, or other proceedings in the cause."

"One tried for a crime, has the right to be present when the jury returns their verdict against him, that he may examine them by the poll, to ascertain if they assent to his conviction."

In **Eliza (a freedwoman) v. State, 39 Ala. 693,** an indictment for grand larceny, the court said:

"(2.) In looking into the record of this case, we find a fatal error, which must reverse the judgment below. In the judgment-entry, it does not sufficiently appear that the prisoner was personally present in court, when she was tried and sentenced. The entry recites, that "this day came S. A. M. Wood, solicitor, and the defendant," &c; and it also recites, that she be taken **hence** to the jail of Tuskaloosa county," &c. These recitals are not sufficient to make it affirmatively appear that the prisoner was present **in person,** both during the trial, and at the time of the sentence. The rule is well settled, in England, and in this State, and is **inflexible, that a prisoner, accused of felony, must be arraigned in person, and must plead in person; and in all the subsequent proceedings, it is required that he shall appear in person.**"

In **Waller (a freedman) v. The State, 40 Ala. 325,** the court said on page 332:

"It was erroneous for the court to allow the jury to return their verdict to the clerk, under the facts of this case. The counsel had no authority to assent

thereto, or to waive the right of a prisoner, charged with a felony, **to be present when the jury delivered their verdict to the court.** The State v. Hughes, 2 Ala. 102; 2 Hawk. ch. 47; 2 Lead. Crim. Cases, 452; Nomague v. The People, 1 Breese, 109; 1 Chitty's Crim. Law, 626; 1 Term R. 434; Prine v. Commonwealth, 6 Har. (Pa.) 103; 1 Bish. Cr. Pro. §688; State v. Buckner, 25 Mis. 168; Eliza v. The State, 39 Ala. 693."

In **Slocovitch v. The State, 46 Ala. 227**, the court said in the headnote:

"1. Trial for indictable offense, cannot be had without personal presence of prisoner. No person indicted for a criminal offense, whether it be for a felony or a misdemeanor, can be tried **without being personally present in court**, and a judgment rendered upon a conviction obtained in his absence, if for a fine only, is erroneous, and will be reversed on appeal."

In **Cook v. The State, 60 Ala. 40**, the court said on page 41:

"It was **not within the authority of prisoner's counsel** to waive for him his right to be present when the verdict was delivered.—Waller v. The State, 40 Ala. 333; Young v. The State, 39 Ala. 358; Sperry v. Commonwealth, supra; Eliza v. The State, 39 Ala. 694."

In **Wells v. The State, 147 Ala. 140**, the court said in 1, 3 and 5 headnotes:

"1. Criminal Law; Verdict; Rendition; Presence of Accused.—It is essential to the validity of a verdict in all criminal cases that it be rendered in open court, and **in the presence of the accused.**"

"3. Same; Reception of Verdict; Recess.—It is

error to permit the clerk of the court to receive the verdict of the jury during the recess of the court, in a felony case, in the absence of accused **even with the consent of his counsel.**''

''5. Same; Waiver; Misdemeanors.—The right to be present when the verdict is rendered, in a misdemeanor case, may be waived by the accused.''

ARKANSAS.

Sneed v. State, 5 Ark. 431, 41 Am. Dec. 102.
Cole v. State, 10 Ark. 318.
Sweeden v. State, 19 Ark. 205.
Warren v. State, 19 Ark. 214, 68 Am. Dec. 214.
Brown v. State, 24 Ark. 620.
Osborn v. State, 24 Ark. 629.
Gore v. State, 52 Ark. 285, 12 S. W. 564, 5 L. R. A. 832.

In **Sneed v. The State, 5 Ark. 431**, an indictment for larceny, the headnotes were as follows:

''Larceny is, by the common law, a felony; and an indictment for a felony cannot be tried unless the prisoner be **personally present** at the trial. The law is thus careful for the safety of the citizen through the whole trial, from his arraignment to the final disposition of the cause, lest in so important a matter he should be prejudiced.''

''The prisoner must also be present when the verdict of the jury is returned.''

''Where the prisoner is out on bail the rule is the same; the law not regarding the cause of his absence, as whether he be absent voluntarily or against his will.''

''A verdict taken in the absence of the prisoner is void.''

In **Cole v. The State, 10 Ark. 318**, an indictment for as-

sault with intent to murder, the court said on page 325:

"And the authorities are equally numerous, pointed, and respectable, that, in all cases of treason and felony, the verdict, whatever may be its effect, **must be delivered in the presence of the defendant in open Court,** and cannot be either privily given, or promulgated, while he is absent, and if he does not appear the jury must be discharged without rendering it. (1 Ch. Cr. Law 636, 1 Breese 109. Overton's Tenn. Rep. 435. The People vs. Perkins, 1 Wend. 91.) And the defendant's being out on bail does not alter the case. State v. Hulbert, 1 Root 91. Sneed vs. The State, 5 Ark. 432."

In **Sweeden v. The State, 19 Ark. 205,** an indictment for assault with intent to murder, the court said in the second headnote:

"On indictments for slight misdemeanors, the accused may be tried without being personally present; but **upon charges amounting to felony,** he must be **personally present in Court during the trial."**

In **Warren v. The State, 19 Ark. 214,** the court said in the first headnote:

"In a criminal prosecution for a slight misdemeanor—as for gaming—a verdict may be rendered and a judgment pronounced, without the defendant being personally present in Court at the time."

In **Brown v. The State, 24 Ark. 620,** at 627 the court said:

"The remaining ground relied on for a reversal, is well taken. Upon examination, we find that **the record does not show that the accused was personally present in court,** at the time the venire facias for the trial of this case was ordered; and it has been repeatedly decided by this court that, **in prosecutions for felony, the defendant must be personally present**

at each and every time when any step is taken by the court in his cause, and that the record must affirmatively show the fact.''

In **Osborn v. The State, 24 Ark. 629,** at page 635, the court said:

''Referring to the transcript, we find that the defendant was not present when the time for the service of a copy of the indictment was waived, nor was he present when the order for a venire was granted on the motion of the attorney for the state; and therefore he was not legally put upon his arraignment, and that it was error in the court to proceed with the trial, until he was so legally arraigned.''

In **Gore v. The State, 52 Ark. 285,** the court said:

''Criminal Procedure: Trial for felony: Presence of defendant. ''Section 2213 Mansfield's Digest which provides that if a defendant on trial for a felony, escapes from custody after his trial has commenced, ''or if on bail, shall absent himself during the trial, the trial * * * may progress to a verdict,'' is not unconstitutional. The guaranty of the Constitution (Art. 2, Sec. 10) that the defendant shall have the right to be confronted with the witnesses against him, does not include the right to abscond and then complain of his own absence.''

''It has been uniformly held by this court that a defendant, charged with felony, has a right to be present at every stage of his trial. Sections 8 and 10 of Article 2 of the Constitution have been construed to guarantee him that right. **And it has been often held that a defendant cannot waive his constitutional rights by agreement.** It is now to be determined whether the constitutional guaranty that the defendant shall be confronted with the witnesses against him remains, where he, pending a trial, ab-

sconds and refuses to be confronted. Neither direct authority nor analogy are lacking in the construction of this guaranty."

CALIFORNIA.

People v. Kohler, 5 Cal. 72.
People v. Ebner, 23 Cal. 159.
People v. Beauchamp, 49 Cal. 41.
People v. Higgins, 59 Cal. 357.

In **The People v. Kohler, 5 Cal. 72,** indictment for murder the court said:

"The bill of exceptions shows that after the jury retired, they returned and asked to hear read two depositions of witnesses of the defendant. The depositions were read to them, and this was done **during the absence of the prisoner.** The rule is familiar that the prisoner, in a case of felony, must be present during the whole of his trial; and reading evidence taken by deposition, although it was done after the jury had retired, is a part of the trial as much as any other. **In favor of life, the strictest rule which has any sound reason to sustain it, will not be relaxed."**

In **People v. Beauchamp, 49 Cal. 41,** the court said in the 2 headnote:

"Receiving verdict in case of Felony.—In a case of felony, the prisoner must be personally present in Court when the verdict is rendered. **If the verdict is received in his absence, it is not valid."**

In **People v. Higgins, 59 Cal. 358,** the court said:

"The defendant, being charged with a felony, was required to be present during the whole of the trial, including the rendition of the verdict. **Without his**

presence, no valid verdict or judgment could be given against him.''

COLORADO.

Green v. People, 3 Colo. 68.
Smith v. People, 8 Colo. 457.

In **Green v. The People, 3 Colo. 68,** the court said in the headnotes:

''1. Under the statute of Colorado an assault with intent to murder is felony.''

''2. It is error to render a verdict in a charge of felony, the defendant being absent and under confinement in jail; **his right to be present cannot be waived by counsel.''**

In **Smith v. People, 8 Colo. 457,** the 1st and 2nd headnotes as as follows:

''1. It is a general rule that the prisoner in a case of felony must be present at every step of the proceedings, or the proceedings will be invalid; except in cases of misdemeanor **the privilege cannot be waived by counsel.''**

''2. If the prisoner is deprived of the privilege of being present when the verdict is returned, the verdict must be set aside and a new trial granted, or the judgment will be reversed.''

CONNECTICUT.

State v. Hurlbut, 1 Root 90.

In **State v. Hurlbut, 1 Root, 90,** (1784) the report of the case was as follows:

''Information for counterfeiting money; trial to the jury, and the defendant was out upon bail: The jury returned into court with their verdict, and the defendant being called did not appear: The question was, whether the court would receive the ver-

dict. **By the court,** the defendant must appear, or there will be no propriety in receiving the verdict.''

FLORIDA.

Holton v. State, 2 Fla. 500.
Gladden v. State, 12 Fla. 562.
Summeralls v. State, 37 Fla. 162, 53 Am. St. Rep. 247.

In **Holton v. the State, 2 Fla. 476,** indictment for murder, the court said on page 500:

> ''But there was another very important, settled and well established principle of criminal law violated, we think, by this proceeding; which is, that during the trial of a capital case, (the whole trial,) the prisoner has the right to be, and must be, present —no step can be taken by the court in the trial of the cause in his absence. This results from the humanity of the law, and the tender regard it has for human life; which forbids that any proceedings shall take place in the trial of such a cause, unless the prisoner charged is present in court, to make his objections to any and every step that may be taken in it, which he may deem illegal, and to do whatever else he may or can legally and properly do in his own defence.''

In **Gladden v. The State, 12 Fla. 562,** the court said in the 14th headnote:

> ''14. The prisoner, in a capital case, must be personally present during the whole of the trial, and at every step taken in the cause. He has the right to discuss questions, both of law and of fact, and no step can be taken in his absence.''

In **Summeralls v. The State, 37 Fla. 162,** the court said on page 164:

[State v. Hutchinson, 95 La. 566.

"It is well settled by repeated decisions here, as well as in other states, that in cases of felony the accused must be personally present in court during every stage of his trial from its beginning to and including the final passing of sentence. **If it is shown that he was absent during the taking of any essential step in the trial, he can not be said to have had a trial in due course of law.** He has a right to be present in person at the rendition of the verdict in order to exercise the right of polling the jury, and the verdict, in such cases, can not legally be rendered or received during his absence; and it makes no difference whether his absence be voluntary or involuntary."

ILLINOIS.

Holliday v. People, 4 Gilm. (9 Ill.) 111.
Harris v. People, 130 Ill. 457, 22 N. E. 826.

In **Holliday v. The People, 4 Gilm. (9 Ill.) 111,** the court said in the last headnote:

> "According to the principles of the Common Law, in all capital cases, the verdict must be received in open Court, and in the presence of the prisoner. The rule, however, did not apply to cases of inferior misdemeanor."

In **Harris v. The People, 130 Ill. 457,** the court said on page 459:

> "It has been a well established rule of the common law from an early period, that a prisoner accused of a felony must be arraigned in person and must plead in person, and his personal appearance is required throughout the trial, and at the time sentence is pronounced. As said Mr. Chitty: "Although a defendant accused of a misdemeanor may be found guilty in his absence, this can never be

done in capital felonies, but it is necessary that he should personally attend, and it should so appear on the record.'' 1 Chit. Crim. Law, 414. A leading authority on this question is Rex v. Harris, 1 Ld. Raym. 267, Comb. 447, Holt, 399, Skin. 684, in which it was held by Lord Holt, that a judgment can not be given against any man in his absence for a corporal punishment.''

KANSAS.

State v. Myrick, 38 Kan. 238.

In **State v. Myrick, 38 Kan. 238,** indictment for assault with intent to murder; the court said on page 240:

> ''His presence is no less necessary or important when the jury are instructed than during the impaneling of the jury, the introduction of evidence, the argument of counsel, or the reception of the verdict. In the present case the defendant was on trial for a felony, and the instructions requested and given were exceedingly important. As the statute forbids the trial of a person for felony, unless such individual be personally present during the trial, the presence of the defendant's counsel and **their consent** to proceeding with the trial in his absence and imprisonment will not cure the illegality. **It has frequently been decided that the right of a defendant in a prosecution for felony to be present is one that cannot be waived by counsel,** and that a reviewing court will not in such cases stop to inquire in regard to the correctness of the instructions given, or steps taken during the absence of the defendant.''

KENTUCKY.

Temple v. Commonwealth, (77 Ky.) 14 Bush 769, 29 Am. Rep. 442.

In **Temple v. Commonwealth, 14 Bush 769, (77 Ky.) 29 Am. Rep. 442,** which is one of the leading cases on the subject, the court said, in a case of an indictment for murder:

"The bill of rights declares 'That in all criminal prosecutions the accused hath a right to be heard by himself and counsel.' The right exists to be heard by himself and counsel and to have a reasonable opportunity to have his counsel present also at every step in the progress of the trial, and to deprive him of this right is a violation of that provision of the fundamental law just quoted."

"**The presence of the accused is not a mere form. It is of the very essence of a criminal trial not only that the accused shall be brought face to face with the witnesses against him, but also with his triers. He has a right to be present not only that he may see that nothing is done or omitted which tends to his prejudice, but to have the benefit of whatever influence his presence may exert in his favor. And at no time in the whole course of the trial is this right more valuable than at the final step when the jury are to pronounce that decision which is to restore him to the liberty of a citizen, or to consign him to the scaffold or to a felon's cell in the state prison. He has a right not only to see and know that the whole jury is present assenting to the verdict, but by polling to demand face to face of each juror whether the verdict is his verdict, and to object to it unless each member of the jury shall answer for himself that the verdict is his.**"

"The right to poll the jury in criminal causes has in this state always been deemed an essential part of the right of trial by jury. It is guaranteed by both the constitution and the statute, and ought to be maintained and preserved by the courts as es-

sential to the protection of the rights of the citizen.''

LOUISIANA.

State v. Ford, 30 La. Ann. 311.
State v. Bradley, 30 La. Ann. 326.
State v. Christian, 30 La. Ann. 367.
State v. Thomas, 128 La. Ann, 813, 55 So. 415.

In **STATE V. FORD**, 30 La. 311, the court said in the 2nd headnote:

''The **presence of the accused,** at the time the verdict against him for a felonious offense is received, **is essential to the validity of the verdict.**''

In State v. Christian, 30 La. 367, the court said in the 2nd headnote:

''Where the record in a criminal case fails to show that the accused was present in court, at any time from the moment of his arraignment to his sentence, the judgment and verdict against him will be annulled, and set aside.''

In **State v. Thomas, 128 La. 813,** indictment for murder, the court said in the 1 headnote:

''Not only must the defendant be present at every stage of his trial for a felony, but the record must show his presence or disclose facts that will authorize the presumption that he was present; and a conviction in such case is vitiated when it appears, affirmatively, that the defendant was absent from the court whilst a person, called as juror, was being examined on his voir dire, and when he was challenged peremptorily by his (defendant's) counsel. Nor does it affect the question that defendant failed, at the time, to object and except, since ''That which the law makes essential, in the deprivation of life and liberty, **cannot be dispensed with or affected by**

the consent of the accused; much less, by his mere failure, when on trial and in custody, to object to unauthorized methods.''

MASSACHUSETTS.

Commonwealth v. Tobin, 125 Mass. 203.

In **Commonwealth v. Tobin, 125 Mass.** 203, indictment for felony, the court said on page 207:

''The law requires the double safeguard against mistake: 1st, the delivery of the verdict by the foreman as the organ of the jury, by word of mouth, in open court, **under the sense of responsibility attending such an utterance in the face of the court and of the public, and, in a case of felony, of the accused**; and, 2d, the proclamation by the clerk of that verdict, as understood and recorded by the court. The fact that in this Commonwealth the defendant is not entitled or permitted, as he is in England and in many states, to have the jury polled, makes it peculiarly important for the security of his rights to adhere to the established forms, remembering the words of Chief Justice Shaw, **''In this respect it is true that forms are substance.''** Commonwealth v. Roby, 12 Pick. 496, 514, 515.

MINNESOTA.

State v. Recards, 21 Minn. 47.

In **State v. Reckards, 21 Minn. 47**, the court said on page 50:

''Sec. 3, ch. 114, Gen. Stat., provides that even an indictment for misdemeanor may be tried in the absence of the defendant, if he appear by counsel, his personal presence being required only upon his trial for felony.''

MISSISSIPPI.

Scaggs v. State, 8 Smed. & M. 722.
Price v. State, 36 Miss. 531, 72 Am. Dec. 195.
Stubbs v. State, 49 Miss. 716.
Finch v. State, 53 Miss. 363.
Sherrod v. State, 93 Miss. 774, 47 So. 554, 20 L. R. A. N. S. 509.
Warfield v. State, 96 Miss. 170, 50 So. 561.
McLendon v. State, 96 Miss. 250, 50 So. 864.
Stanley v. State, 97 Miss. 860, 53 So. 497.
Corbin v. State, 99 Miss. 486, 55 So. 43.

In **Scaggs v. The State of Mississippi, 8 Smed. & M. 722,** the court said in a headnote:

> "In a case of murder, the record must show affirmatively that the accused was present during the trial."

In **Price v. The State of Mississippi, 36 Miss. 531,** the court said on page 542:

> "The general rule is, that the verdict, in cases of felony, must be delivered in open court, and in the presence of the defendant. 1 Chitty Cr. L. 636. This rule is founded on two reasons: first, the right of the defendant to be present, and to see that the verdict is sanctioned by all the jurors; and secondly, in order that the defendant, if convicted, may be under the power of the court, and subject to its judgment. The right of the defendant to be present, proceeds upon the presumption that he is in custody, and has no power to be present, unless ordered by the court to be brought into court."

In **Stubbs v. The State, 49 Miss. 716,** the court said on page 724:

> "The rule that the accused, in cases of felony, must be present in person pending the trial, and that

this must be affirmatively shown by the record, as we have seen, is not an open question in this State."

In **Finch v. State, 53 Miss. 363,** indictment for grand larceny, the court said on page 365:

"The accused had the right to be present when the verdict was announced, that he might witness the proceeding, and poll the jury. It was erroneous to receive the verdict in his absence. The court had no right to discharge the jury under the circumstances."

In **Sherrod v. State, 93 Miss. 774,** the 1st, 2nd and 4th headnotes were as follows:

"1. A defendant on trial for a crime other than a capital felony, who is on bond, may waive the right to be present when a verdict is received; but **in capital cases the accused cannot waive the right,** whether he be in jail or on bond, nor in felony cases not capital where he is in jail."

"2. The right to waive the presence of the accused when the verdict is received is personal, and **cannot be exercised by attorney.**"

"4. That one indicted for murder and on bond was convicted only of manslaughter does not cure error in receiving the verdict in his voluntary absence."

In **Barfield v. State, 96 Miss. 170,** the court said:

"The absence of the defendant, on trial for murder, during a part of the time the jury was being impaneled, is fatal error."

In **McLendon v. State, 96 Miss. 250,** the court said:

"Where the defendant, on trial for murder, during a suspension of the trial was carried from the court room, on his request, to a toilet room in the court

house yard, and during his absence the trial was resumed and an important witness for the state examined, there was fatal error.''

In **Stanley v. State, 97 Miss. 860, 53 So. 497,** the first headnote was:

''One on trial for murder has a constitutional right to be present during the entire trial, which he cannot waive; and the inadvertent examination of a witness for him in his absence, while confined in jail, requires the entry of a mistrial, and a trial de novo, notwithstanding his silence on the court being advised of the fact.''

In **Corbin v. State, 99 Miss. 860, 55 So. 43,** the court said in the 3rd headnote:

''One physically unable to attend his trial for a misdemeanor does not voluntarily absent himself and waive the right to be present, guaranteed by Const. §26; and where he is tried in his absence he is deprived of his constitutional right.''

MISSOURI.

State v. Buckner, 25 Mo. 172.
State v. Cross, 27 Mo. 332.
State v. Braunschweig, 36 Mo. 397.
State v. Davis, 66 Mo. 684, 27 Am. Rep. 387.
State v. Smith, 90 Mo. 37, 59, Am. Rep. 4.

In **State v. Buckner, 25 Mo. 167,** the court said in the 5th headnote:

''5. In the case of an indictment for murder it is error to receive a verdict of the jury in the absence of the defendant. He must be personally present, not only during the trial, but at the time of the rendition of the verdict.''

In **State v. Cross, 27 Mo. 332,** the court said in the 1st headnote:

"1. In a capital case, the defendant must be present at the time of the rendition of the verdict; and the record must affirmatively show his presence."

In **State v. Braunschweig, 36 Mo. 397,** the court said in the 1st headnote:

"1. In cases of felony, the accused must be personally present at the trial, and no verdict can be entered against him except in his presence."

In **State v. Davis, 66 Mo. 684,** the headnote was as follows:

"A prisoner on trial for a criminal offense cannot consent to a proposal from the prosecuting attorney to go to trial with less than a full panel of jurors. Morally he is in chains; his action is involuntary and cannot constitute a waiver of his legal right to a full panel. Whether he may waive his right of his own motion, and without suggestion from the other side, quaere?"

In the body of the opinion, the court said on page 686:

"**The very term waiver imports a voluntary act, and an act cannot be thus denominated when performed under conditions of practical compulsion.** If the accused fails to object to an improper proposal coming from the representative of the State, he thereby loses a right guaranteed to him by the law. If he objects, he thereby jeopards his right to an impartial trial by jury, guaranteed to him by the constitution. Under such circumstances, to hold the prisoner bound by an involuntary, so-called, and extorted consent, would be purely farcical, and the merest mockery of justice."

"We do not by the above remarks, intend to be

understood as meaning that the accused may not voluntarily, and of his own head, waive any right, short of a constitutional one; but we do mean to assert that such waiver must be one in deed and in truth; in reality, not alone in name and appearance; not made as the result of what is in effect, an intimidatory suggestion of the prosecuting attorney."

In **State v. Smith, 90 Mo. 37,** the court said in the 3rd headnote:

"3. Impaneling and examining the jury is a material and substantive step during the trial, within the meaning of the statute, and the defendant cannot waive the requirement to be present when it is taken."

NEBRASKA.

Burley v. State, 1 Neb. 385.

The 3rd and 4th headnotes of the case of **Burley v. The State, 1 Neb. 385,** the court said:

"3. The record should also show that the prisoner was present at and during the trial, and at the rendition of the verdict."

"4. **Nor can the prisoner waive his right thus to be present when on trial for a capital felony.**"

NEW JERSEY.

State v. Peacock, 50 N. J. L. 34, 11 Atl. 270.

In **State v. Peacock, 50 N. J. L. 34,** it was said in the body of the opinion; the case being an indictment for a felony:

"In felonies, in England, no verdict could be rendered in the absence of the defendant, but in the case of State v. Jackson, 20 Vroom 252, it was held that by a long course of procedure the practice has

become settled in this state to receive the verdict of the jury in all criminal cases, **except capital cases,** without the presence of the accused."

NEW YORK.

People v. Perkins, 1 Wend. 91.
Maurer v. People, 43 N. Y. 1.

One of the leading and earliest cases in this country is **People v. Perkins, 1 Wend. 91.** The decision is reported as follows:

"By the Court, Savage, Ch. J. We are of opinion that the verdict was irregular. The prisoner was indicted, and tried, for an offence, formerly called capital. And though many of the ancient forms on trials are now dispensed with, the prisoner should have been present on receiving the verdict, so that he might have availed himself of the right of polling the jury. We advise that the verdict be set aside, and that there be a new trial."

In **Morrow v. People, 43 N. Y. 1,** the headnotes were as follows:

"All instructions or information given by the court to the jury, having a tendency to influence the verdict, are a part of the trial, within the provision of the statute that no person indicted for felony can be tried, unless he be personally present during such trial."

"Accordingly, where the plaintiff in error having been indicted, and being on his trial for murder, after the jury had retired to deliberate upon their verdict, they returned into court and asked certain questions of the court as to what has been the evidence on particular points, to which the court replied, giving the information requested, **Held,** that this was a proceeding upon the trial within the

statute, and the prisoner not having been present, it was error, for which his conviction must be reversed."

"**Held**, further, that neither the **presence of the prisoner's counsel**, nor his omission to object, **could waive the illegality.**"

NORTH CAROLINA.

State v. Blackwelder, Phil. L. 38.
State v. Bray, 67 N. C. 283.
State v. Jenkins, 84 N. C. 812, 37 Am. Rep. 643.
State v. Paylor, 89 N. C. 539.
State v. Kelly, 97 N. C. 404, 2 Am. St. Rep. 643.
State v. Cherry, 154 N. C. 624, 70 S. E. 294.

In the course of the opinion, in the case of **State v. Blackwelder, 61 N. C. 38,** the court said:

"The question thus presented is one of very great importance in the trial of capital crime. It is whether the prisoner has a right to be present at the bar at all times during the progress of his trial. We believe that the general impression among the profession in this State is, and always has been, that he has such right; and that the practice has always been in conformity to this impression. The point has never been directly adjudicated, but in the case of State v. Craton, 6 Ire. 104, the implication in favor of the existence of the right is so strong that we must regard it as equivalent to a positive decision."

The first headnote in **State v. Bray, 67 N. C. 283,** was:

"When a verdict, in a case subjecting a party to punishment in the penitentiary, is rendered out of Court, to a Judge at his chambers, in the absence of the prisoner and his counsel, and is entered on the record on the next day, in the absence of the jury

and the prisoner; **Held,** that such verdict cannot be sustained."

State v. Jenkins, 84 N. C. 812, is one of the leading cases on this subject. The opinion was rendered by Judge Ruffin. The 2nd headnote was as follows:

"In the prosecution of all felonies, the prisoner has the right to be present throughout the trial; and this right cannot be waived in capital felonies; the prisoner must be **actually** present. Whether the prisoner can waive it, in those not capital—quaere; his counsel cannot."

In the opinion in **State v. Paylor, 89 N. C. 539,** it was said:

"In the trial of capital felonies, the rule of practice seems to be uniform in all the states that the prisoner should be present during the whole of the trial; **and in favor of life, this rule is never relaxed."**

State v. Kelly, 97 N. C. 404, involved the trial of an indictment for larceny. We call the court's attention to the fact that the obiter statement in the 3rd headnote is contraducted by the opinion. The headnot referred to was as follows:

"**It seems,** that a prisoner in a capital felony can waive his right to be present at all stages of the trial, but his counsel cannot waive it for him."

Speaking of capital felonies, in the opinion, the court said:

"The rule that he must be so present in capital felonies is in favorem vitae."

In **State v. Cherry, 154 N. C. 624,** the court said in the 2nd headnote:

"In felonies less than capital and in misdemeanors the defendant has the right to be present at the trial;

but this right may be voluntarily waived by him, the limitation being that in the case of felonies this waiver may not be made by his counsel unless he expressly authorizes them so to do."

OHIO. Wilson v. State, 2 Ohio State 319.

Sargent v. State, 11 Ohio 472.
Rose v. State, 20 Ohio 31.

In **Sargent v. Ohio, 11 Ohio Reports 472,** the 2nd headnote was as follows:

"In criminal cases, the verdict should be received in presence of the prisoner, that he may have the jury polled."

In **Rose v. Ohio, 20 Ohio Reports 31,** the court said on page 33:

"Again, an accused person, when a verdict of guilty is returned against him, has a right to have the jury polled. This privilege is never in this State, denied, in a criminal case, although it is a matter of discretion with the court whether it shall or shall not be allowed in a civil case. Of this privilege the accused person is deprived unless present when the verdict is returned. We conceive it to be the right of an accused person to be present during the trial of his case, and at the return of the verdict, and we think that when deprived of these privileges by being imprisoned in jail, or in any other improper manner, the verdict returned against him should not be followed by judgment or sentence of the court, but a new trial should be ordered if requested."

OKLAHOMA.

Day v. Territory, 2 Okla. 409, 37 Pac. 806.
Leroy v. Territory, 3 Okla, 596, 41 Pac. 612.
Humphrey v. State, 3 Okla. Cr. 504, 106 Pac. 978, 139 Am. St. Rep. 972.

In **Day v. Territory of Oklahoma, 2 Okla. 409,** the court said on page 412:

> "A leading principle that pervades the entire law of criminal procedure is, that after an indictment is found **nothing shall be done in the absence of the prisoner.** While this rule has, at times, in cases of misdemeanor, been somewhat relaxed, yet, in felonies, **it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial.**" * * *
>
> "From the record, it does not appear affirmatively that the defendant has been afforded his constitutional right of presence during the trial. It may be, and more than likely is true, that the defendant was, in fact, present at all times and that the error is an inadvertence in making up the record when his case was called for consideration; but it would be a dangerous precedent to establish, for the court to assume such to be the truth and thus give its assent to a conviction where the records fail to show that the defendant was actually present on his trial, **thereby saying to the world that the trial of a defendant may take place in this territory, in his absence, in violation of a sacred and humane, constitutional, as well as a statutory, immunity.**"

In **LeRoy v. Territory of Oklahoma, 3 Okla. 596,** the court said in the headnote:

> "In a criminal prosecution for a felony the defendant must be actually present at every step in the trial, and in cases where it is necessary the record must show affirmatively the fact of his presence. A case-made cannot be so amended by the trial judge as to contradict the records of the court."

In **Humphrey v. State, 3 Okla. Crim. Rep. 504,** the court said in the 2nd headnote:

"2. In a criminal prosecution for a felony, the defendant must be present, in person, during the trial, and the record must affirmatively show this fact."

The court said in the opinion on page 507:

"It may appear technical to reverse the case for the failure of the record to show the presence of the defendant, when in all probability the defendant was present at each step taken during the trial. **Courts of last resort must establish precedents under which innocent men are to be tried.** The law presumes every man innocent, and this presumption clings to him until overcome by competent evidence in a fair trial conducted according to law. Even though the evidence in this case is sufficient to warrant the verdict of guilty, yet we must not declare a rule in this case that would deprive an innocent man of any substantial right. It is not the fault of appellate courts when such a precedent must be declared in a case where the proof shows the defendant guilty. The fault, if any there be, is with the trial court, the clerk, and the prosecuting attorney in their failure to have the record speak the truth."

PENNSYLVANIA.

Dunn v. Com., 6 Pa. St. 384.
Prine v. Com., 18 Pa. St. 103.
Dougherty v. Com., 69 Pa. St. 286.

The 2nd headnote of **Dunn v. Commonwealth, 6 Pa. St. 384**, one of the leading cases, was:

"In capital felonies, the record must show that the prisoner was present at the trial, verdict, and passing of the sentence."

The following are extracts from the opinion by Judge Coulter:

"At the rendition of the verdict, the prisoner is

entitled to have the jury polled, so that each one shall answer on his own responsibility, **face to face with the prisoner,** as to his guilt or innocence."

"This has been deemed one of the material hedges and safeguards which the common-law forms throw around a person tried for life, and therefore it ought to appear distinctly from the record that he was afforded an opportunity to avail himself of it." * * *

"How easy would it have been for the clerk to enter that "the prisoner being brought into court, and asked, &c., the court proceeded to sentence him to death as follows, &c.;" and how easy is it, in such cases, for the court to see, that, in a matter of life and death, it is so entered."

"We may safely presume, as individuals, in tranquil times, and in an enlightened city, the conduct of the trial was all right; but, as a court, we can look only to the record, for this record and judgment will be recorded as a precedent for other times; and, if we let in presumptions to supply omissions and defects in records, it will by and by be deemed scarcely necessary to show by the record any of the important safeguards of the trial by jury; and the common-law forms stoutly asserted as a shield of liberty, by the Hampdens, Russels, and Sidneys of other days, will lose their value. **But forms are not merely a shield against the despotism of kings, for there is occasionally a despotism in all countries—A DESPOTISM WHOSE TERRIBLE VOICE IS HEARD IN TUMULTS AND EXCITEMENTS—IN THE RAGE OF UNRESTRAINED AND IMPETUOUS WILL. IT IS THEN THAT THE STERN AND INFLEXIBLE RULES OF THE COMMON-LAW TRIAL BY JURY WILL BEST PROVE THEIR IMPORTANCE AND VALUE.** In the last ten or twenty years there have been mock trials and bloody executions, without the forms of law, in these states

a thing which would have been deemed impossible in the primitive days of the republic.''

''The judgment of this court is, that it does not sufficiently appear by the record that the prisoner was present at the trial, particularly at the rendition of the verdict, nor when sentence of death was passed. Every record of this kind ought to show clearly that the prisoner was tried and sentenced, and is to suffer according to the substantial forms of the law. We cannot say that of this record, and the judgment and sentence is therefore reversed, and the prisoner is discharged."

The case of **Prine v. Commonwealth, 18 Pa. St. 103,** a trial of an indictment for burglary, is a leading case which has probably been more often quoted than any other. The opinion by Chief Justice Gibson is given in full:

''It is undoubtedly error to try a person for felony in his absence, even with his consent. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence. Never has there heretofore been a prisoner tried for a felony in his absence. No precedent can be found in which his presence is not a postulate of every part of the record. He is arraigned at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what he has to say why judgment shall not be pronounced against him. These things are matter of substance, and not peculiar to trials for murder; they belong to every trial for felony at the common law, because the mitigation of the punishment does not change the character of the crime. How could the Court record them as facts, if the truth were not so? Our looseness in recording forms of procedure, especially in criminal cases—if we have

any forms left—has grown till the knowledge of the principles of which they were the exponents, has been lost to the bench and the bar. More method sometimes appears in the record of a justice's judgment for a few dollars, than appears in the record of a conviction of murder. These irregularities strike our professional neighbors with special wonder. They have overborne resistance by force of numbers; but we have not yielded to them in the one case capital by our law. In conviction of murder, we have required the substantive parts of a proper record to be set out so clearly as to be separable from the dross with which it is usually blended. This was in favorem vitae. In other felonies, it is allowable to presume that everything was rightly done till the contrary appear; but when it is stated on the record positively that the prisoner was not present, we cannot shut our eyes to the fact. What authority had the prisoner's counsel in this instance, on the pretext of convenience, to waive their presence? In a criminal case, there is no warrant of attorney, actual or potential; for when a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act; and this is a sufficient reason why he should be in Court to do those things which his counsel could not do for him. It is unnecessary, however, to speak of delegated authority; for **the right of a prisoner to be present at his trial is inherent and inalienable.** The record before us, therefore, is erroneous; but we direct that the prisoners be held to answer a fresh indictment."

SOUTH CAROLINA.

State v. Atkinson, 40 S. C. 363, 42 Am. St. Rep. 877.

Dougherty v. Com., 69 Pa. St. 286

In **State v. Atkinson, 40 S. C. 363,** the court said on page 368:

> "The right of the accused to be present during every stage of his trial for a capital felony has long been settled, and is still fully recognized."

TENNESSEE.

State v. France, 1 Overt. 434.
Andrews v. State, 2 Sneed 550.
Clark v. State, 4 Humph. 254.
Hutchins v. State, 3 Coldw. 95.
Stewart v. State, 7 Coldw. 338.
Percer v. State, 118 Tenn. 765, 103 S. W. 780.

In **State v. France, 1 Tenn. 434,** it is said in the 2nd headnote:

> "In criminal cases affecting life or liberty, the accused must be at the bar when the verdict is rendered."

The court said in the opinion:

> "Per Curiam. The prisoner must be at the bar otherwise the jury cannot be asked for their verdict, and if he does not appear the jury must be discharged without rendering any; and by Overton, J.: In every case affecting life or limb the accused must not only be present when the evidence is given in, but during the trial and on return of the verdict."

In **Andrews v. State, 2 Sneed (Tenn.) 550,** the court said on page 552:

> "In criminal cases of the grade of felony, where the life or liberty of the accused is in peril, he has the right to be present, and must be present during the trial and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over his person to proceed with the

trial or to receive the verdict, or to pronounce the final judgment."

"This rule, founded in the justice and wisdom of the common law, is in substance reiterated in our bill of rights; it is necessary to the full and free exercise of the right of the accused to make his defense; and in case he be legally convicted, that effect may be given on his person, to the judgment of the court."

In **Clark v. The State, 4 Humphreys (Tenn.) 254,** the court said in the headnote:

"In cases of felony and treason the verdict must be delivered in open court in the presence of the prisoner, and, therefore, a verdict rendered, on the trial of a defendant for perjury, in his absence, he having been permitted to go at large during the trial and not having appeared, although called, cannot be sustained."

In **Hutchinson v. The State, 3 Caldwell (Tenn.) 95,** the court said in the headnote:

"Appeal. In felonies, the defendant must give bond to appear before the Supreme Court. A court of error has no jurisdiction to try a defendant for a felony, unless he is present in person."

In **Stewart v. The State, 7 Caldwell (Tenn.) 338,** the court said in the 2nd headnote:

"The absence of a prisoner, (who is found guilty of a felony,) when a jury returns their verdict into court, renders the verdict and judgment against him, void."

In **Percer v. State, 118 Tenn. 765,** the court said in the 3rd and 5th headnotes:

"3. The accused is deprived of his fundamental

and constitutional right to be present in court during his trial, where, when the verdict of guilty in a murder trial was announced, he was in a room adjoining the courtroom handcuffed to another prisoner, not in sight of the judge and all the jurors, and the view through the doorway was obstructed by the sheriff standing therein and holding the door open."

"5. The right of the accused to be present in the courtroom when the verdict of guilty is announced in a felony case is so fundamental that it cannot be waived by the failure of his counsel to make objection to the rendition of the verdict until the accused can be present."

TEXAS.

Shipp v. State, 11 Tex. App. 46.
Massey v. State, 31 Tex. Cr. Rep. 371, 20 S. W. 758.
Hill v. State, 54 Tex. Crim. Rep. 646, 114 S. W. 117.

Darden v. State, 56 Tex. Cr. Rep. 396, 120 S.W. 485.

In **Shipp v. State, 11 Tex. App. 46,** the 2nd headnote was in part as follows:

"The Code of procedure, article 698, expressly directs that the defendant in a felony case shall be personally present in court on certain occasions, of which one is when the jury return into court for further instructions. **Held,** that in the absence of the defendant his counsel cannot waive his right to be personally present on such occasions, and no waiver can be inferred from the silence of counsel for the defense while instructions are being given to the jury in the defendant's absence, nor from the counsel's excepting to the purport of the instructions."

The case of **Massey v. State, 31 Tex. Cr. Rep. 371,** has already been referred to with extensive quotations.

The 3d headnote of the case of **Hill v. State, 54 Tex. Crim. Rep. 646,** was as follows:

"3. Upon trial for murder it was reversible error to permit the reproduction of certain testimony on request of the jury, in the absence of the defendant who was on bail; and this, although his counsel waived defendant's presence and said they would not take any advantage of defendant's absence, and although defendant was voluntarily absent; the first section of the act of the Thirtieth Legislature requiring his personal presence at the trial."

VIRGINIA.

Sperry v. Commonwealth, 9 Leigh 623, 33 Am. Dec. 261.
Hooker v. Commonwealth, 13 Watt. 763.
Jackson v. Commonwealth, 19 Gratt. 656.

The 1st headnote of **Sperry v. Commonwealth, 9 Lee 623,** was:

"Prisoner accused of felony must be arraigned and plead in person; and in all subsequent proceedings he must appear in person and by attorney."

In **Hooker v. Commonwealth, 13 Gratt. 763,** the record failed to show the presence of the defendant throughout the trial. The court said in part:

"It is the right of any one when prosecuted on a capital or criminal charge, 'to be confronted with the accusers and witnesses' and it is within the scope of this right that he be present not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected."

In **Jackson v. Commonwealth, 19 Gratt. 656,** the Military Court of Appeals, in 1870 said in the 1st headnote:

"1. Upon a trial for felony it is the right of the prisoner, a right which he cannot waive, to be present from the arraignment to the verdict. And if the evidence of a witness on the trial, which has been reduced to writing, or any part of it, is read to the jury in the absence of the prisoner, it is error, for which the verdict will be set aside."

WEST VIRGINIA.

State v. Greer, 22 W. Va. 800.
State v. Stevenson, 64 W. Va. 392, 19 L. R. A. N. S. 713.
State v. Sutter, 71 W. Va. 371, 76 S. E. 811, 43 L. R. A. 811, 43 L. R. A. N. S. 399.

In **State v. Greer, 22 W. Va. 800,** the court said in the 7th and 8th headnotes:

"7. Proceeding in a trial in the absence of the prisoner in a felony case is fatal to the verdict. It is absolutely necessary, that the prisoner shall be present in court, when anything is done in his case in any way affecting his interest."

"8. Where in a murder trial the state proceeded to cross-examine a witness during the absence of the prisoner, the verdict will be set aside, although the court, when the prisoner was present, instructed the jury to disregard the evidence, and the state proceeded to ask the same questions of the witness and received the same answers."

In **State v. Stevenson, 64 W. Va. 392,** there was a plea of guilty of murder in the first degree. In order to advise himself the judge proceeded to question the witnesses. The 2nd headnote was as follows:

"2. It is error to the prejudice of the prisoner's legal rights for the court, after receiving the prisoner's plea of guilty of murder in the first degree,

and, before pronouncing judgment thereon, to proceed in the absence of the prisoner to examine witnesses and hear from the special judge who presided at the time of receiving such plea statements respecting the circumstances and facts of the killing, whether such examination be for the personal satisfaction of the judge pronouncing the judgment of the court or to advise him as to the character of judgment that should be pronounced on said plea."

In **State v. Sutter, 71 W. Va. 371,** it was held in the 3d headnote:

"3. Upon a trial for felony after close of the evidence, the judge and the attorneys for both sides go into another room, leaving the accused and the jury in the court room, and in that other room a motion to strike out the evidence of a state witness is made by the accused, and argued, and decided against the accused. On discovery of the absence of the accused, he is sent for, and the judge offers to allow him to again make such motion and argue it, but the accused declines to do so. Such absence of the prisoner demands a new trial."

WISCONSIN.

French v. State, 85 Wisc. 400, 39 Am. St. Rep. 855, 21 L. R. A. 402.

In **French v. State, 85 Wisc. 400,** the 3d headnote was:

"3. A conviction of murder cannot be sustained when neither the minutes of the clerk nor the record shows that the prisoner was present in court when the verdict of guilty was rendered, or that he was present when the sentence was pronounced against him, or immediately before, or that he was asked by the court if he had anything to say why he should not be so sentenced."

COMMON LAW AUTHORITIES AND TEXT WRITERS.

Coke upon Littleton, 227 b.

"But in criminal cases of life or member, the jury can give no privy verdict, but they must give it openly in court."

2 Hale's Pleas of the Crown 300.

"In a case of felony or treason the verdict must be given in open court, and no privy verdict can be given." Co. Lit. 227 b. Co. P. C. 110."

Dominus Rex v. Ladsingham, Sir T. Raym. 193.
(1671.)

"An information was exhibited against Mr. Landsingham of Devonshire, lord of a manor there, for oppressing his tenants, and for several misdemeanors; and upon Not Guilty pleaded, he was found guilty; and Stroud moved to set aside the verdict because unduly given. The information being laid in Devonshire, and the trial there, and yet the jury gave a privy verdict in the county of the city of Exeter which was illegal. 1. To give a privy verdict in a criminal cause, contrary to Coke upon Litt. 227, b. 2. To give the verdict out of the county. But to both these the Court answered thus. To the first. 'Tis intended that no privy verdict can be given in criminal cases which concern life, as felony, **because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present at the same time;** but in criminal cases, where the defendant is not to be personally present at the time of the verdict a privy verdict may be given. And as to the second. Custom hath always

been to give the verdict in that place; and the court did not think the first point fit to be moved, because contrary to the record, but however they resolved as before."

4 Blackstone's Commentaries, 360.

"When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms as upon civil causes; **only they cannot, in a criminal case which touches life or member, give a privy verdict.** 2 Hal. P. C. 300. 2 Hawk. P. C. 439."

1 Chitty Cr. L. 636.

"**Of the verdict.** The verdict whatever may be its effect, must, in all cases of felony and treason be delivered **in the presence of the defendant,** in open court, and cannot be either privily given, or promulgated **while he is absent.** Co. Lit. 227, b.; 3 Inst. 110; Sir T. Raym. 193; 2 Hale 300; Hawk. b, 2, c. 47, s. 2; 4 Bla. Com. 360. Bac. Abr. verdicts, B. Burn, J. Jurors, V. Williams, J. Juries, VII."

Bacon's Abridgement, Title "Verdict," page 308.

"It is in one book laid down, that a privy verdict cannot be given in a case of life or member. 1 Inst. 227.

"In two other books it is laid down, that a privy verdict cannot be given in a case of felony; because the jury are directed, and ought, in such case, to look upon the prisoner when they give their verdict."

Raym. 193, Rex v. Ladsingham; 1 Ventr. 97.

2 Barbour's Criminal Law 365.

"**Verdict.** The verdict in all cases of felony and treason must be delivered in open court **in the presence of the defendant.**"

Archbold's Crim. Pl. & Ev. 23d Ed., p. 186.

"No trial for felony can be had except **in the presence of the defendant,** and he must, it is said, stand in the dock to be tried."

R. v. St. George, 9 C. & P. 483.
R. v. Douglas, C. & Mar. 193.
R. v. Zulueta, 1 C. & K. 215.

Ibid, p. 214.

"On a trial for treason or felony the jury must deliver their verdict in open court, **in the presence of the defendant.**"

R. v. Haynes, (1900) 64 J. P. 441.

Abbott's Trial Brief (Criminal Causes) 2d Edition, 718.

"In felony the accused **must be present** when the verdict is rendered, and his counsel cannot waive the right."

Hughes' Criminal Law, §3370.

"**Presence of defendant essential.**—If the prisoner is deprived of the privilege of **being present** when the verdict is returned the verdict must be set aside and a new trial granted, or the judgment will be reversed."

Clark's Criminal Procedure, p. 423.

"In all criminal prosecutions, the defendant has a right **to be present during the entire proceedings,** from arraignment to sentence. **He cannot, according to the weight of authority, waive the privilege in cases of felony,** nor, according to some, but not all,

of the authorities, in cases of misdemeanor involving corporal punishment."

Wharton's Criminal Pleading and Practice, Eighth Edition, §741.

"**Defendant must be present.** At the time of the rendition of the verdict, as a general rule, the defendant must be present in court, **and in capital cases to take the verdict in his absence is a fatal error.**"

1 Bish. New Criminal Proc., §271 (2).

"An examination of the authorities cited to this section, and to the other sections referred to herein, shows that some courts apply this doctrine (denial of right to waive presence) to all felonies, others permit waiver in those less than capital."

NOTES AND ANNOTATIONS.

A list of the cases with annotations dealing with the subject under consideration has been made and is set out below. All these annotations recognize as propositions too firmly established to be questioned that in capital cases, the defendant must be present at each and every stage of the trial and that neither he nor his counsel can waive such presence. It will be seen from an examination of the cases cited in these annotations that the point about which differences exist is in regard to **felonies less than capital.** Here, the courts have taken divergent views. But in none of these cases is there the slightest suggestion of the existence of any doctrine to the effect that in a capital case the presence of the accused at the trial can be waived **constructively, ex post facto.**

1. Note on "Waiver by Person Accused of Felony of Right to be Present During Course of Trial."

Diaz v. U. S., 223 U. S. 442, 28 Ann. Cas. 1913 C, 1138, 1146.

2. Note on "Waiver of Right of Accused to Be Present at Rendition of Verdict."

Stoddard v. State, 132 Wisc. 520, 13 Ann Cas. 1211.

3. Note on "Right of accused to waive his presence at time of receiving verdict upon trial for felony."

State v. Gorman, Minn. . ., 129 N. W. 589, 32 L. A. R. N. S. 306.

4. Case note on "Waiver of presence of one charged with misdemeanor, at time of receiving verdict."

State v. Waymire, . . Or. . ., 97 Pac. 46, 21 L. R. A. N. S. 56.

5. Note on "Right of accused to waive his presence at time of receiving verdict upon trial for felony."

State v. Way, 76 Kan. 928, 93 Pac. 159, 14 L. R. A. N. S. 603.

6. Note on "Right to be present during trial."

Gore v. State, 52 Ark. 285, 5 L. R. A. 832, 834.

7. Note on several phases of the subject.

Humphrey v. State, 3 Okl. Cr. 504, 106 Pac. 978, 139 Am. St. Rep. 972.

8. Note on proposition that "the authorities agree that the presence of the accused in a criminal prosecution for a capital crime is essential to the validity of a verdict of guilty."

22 Encycl. Pl. and Pr. 927.

9. 14 American Digest, Century Edition, page 2223.

10. 15 American Digest, Century Edition, page 781.

11. 16 American Digest, Decennial Edition, page 816, "Criminal Law," Key Numbers, 636, 636 (8), 918 (9), 933, 946, 971 (2), 972.

The foregoing list of authorities comprises all that a careful search has been able to discover. They are not merely the cases that support the contention of the plaintiff in error. They are all the cases on the subject. Where the name of any state does not appear on the list, it is because no decision was found in its reports dealing with the question.

From this array of authority, there is but one conclusion to be drawn. The uniformity with which the rule has been declared that a man may not be tried for his life in his absence, its universality, and the stern courage with which it has been upheld by the courts reveal it in the light of a great fundamental principle, immovably grounded, not only in municipal and constitutional law, but in an instinctive sense of justice and of right.

In plain terms, what happened in this case was this: A citizen on trial for his life was run out of the court house by a mob, and the Supreme Court is now called upon to determine whether it was lawful to continue the trial thereafter in his absence while he was locked up in a cell in the jail.

If, in a capital case, it be lawful in the absence of the accused to receive the verdict, no logical reason can be given why it would not be equally lawful to carry on the examination of witnesses, hear the arguments of counsel, receive the charge of the court, and, indeed, conduct the whole trial from beginning to end in his absence.

The contention of the state reduced to its last analysis is an effort to introduce into its laws and to legalize the trying of human beings for their lives in their absence. We do not think it should succeed.

As to the contention of "waiver," it is submitted that if the court had failed to bring Leo M. Frank into court at all, and his entire trial had been conducted in his absence, and if, after a verdict of guilty, he had been brought into court and he had then declared that he accepted the verdict and would waive all objections that he might have to it, no one with the slightest conception of legal principles would contend for an instant that such a statement on his part would cure the inherent illegality of the proceedings or bar him from afterwards asserting at any moment prior to the execution of sentence that the trial was a legal nullity and wholly void. Wherein lies the difference in principle between the supposed case and the case at bar? Wherein were the proceedings in the latter any less illegal; wherein was the alleged "waiver" any more effective?

The 6th and 7th grounds of the motion filed by the plaintiff in error are here and now insisted upon. The judgment of the trial judge as interpreted by this court was a denial to the plaintiff of due process of law.

The judgment of the trial judge as interpreted by this court was a denial to the plaintiff in error of the equal protection of the law in that the standard of order recognized as legal at his trial fell below the standard of order established by the decisions of this court in the prior cases of—

Daniel v. State, 56 Ga. 653.
Smith v. Lovejoy, 62 Ga. 373.
Woolfolk v. State, 81 Ga. 551.
Myers v. State, 97 Ga. 76.

Collier v. State, 115 Ga. 803.
Patton v. State, 117 Ga. 238.
O'Dell v. State, 120 Ga. 152.

For all the reasons stated in this brief, it is submitted that the plaintiff in error was denied his rights, privileges and immunities under the 3rd and 5th paragraphs of the 1st Section of the 1st Article and under the 1st paragraph of the 18th Section of the 6th Article of the Constitution of the State of Georgia, and was denied his rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,
HENRY A. ALEXANDER,
Of Counsel.

TYE, PEEPLES & JORDAN,
HERBERT J. HAAS,
LEONARD HAAS,
HENRY A. ALEXANDER,
Attorneys for Plaintiff in Error.